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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

GRACE AZNAVORIAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1A–33A) is not yet reported.

JURISDICTION

This class action for declaratory, injunctive, and monetary relief was initiated pursuant to 42 U.S.C. 405(g), as incorporated in 42 U.S.C. (Supp. V) 1383(c)(3). The district court's order was entered on August 23, 1977 (App. B, *infra*, pp. 34A–38A). The court's judgment was entered on September 6, 1977 (App. C. *infra*, pp. 39A–40A). Notice of appeal

to this Court was filed on September 22, 1977 (App. D, *infra*, p. 41A). On November 15, 1977, Mr. Justice Rehnquist extended the time for docketing the appeal to and including January 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8; *McLucas* v. *DeChamplain*, 421 U.S. 21, 31–32.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 1611(f) of the Social Security Act, as added, 86 Stat. 1468, 42 U.S.C. (Supp. V) 1382(f), provides:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for [Supplemental Security Income benefits] * * * for any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this title with respect to any month during all of which such person is outside the United States). For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Section 1631(c)(3) of the Social Security Act, as added, 86 Stat. 1476, and amended, 42 U.S.C. (Supp. V) 1383(c)(3), provides:

> The final determination of the Secretary after a hearing [on eligibility for or the amount of Supplemental Security Income benefits] * * * shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Section 205(g) of the Social Security Act, as added, 53 Stat. 1370, and amended, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. * * *

QUESTIONS PRESENTED

1. Whether Section 1611(f) of the Social Security Act violates the Due Process Clause of the Fifth

Amendment by suspending payment of Supplemental Security Income benefits to otherwise eligible persons who have remained outside the country for at least 30 consecutive days, until such persons return to the United States and stay within the country for 30 consecutive days.

2. Whether a class action may be maintained under Section 205(g) of the Social Security Act.

3. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Supplemental Security Income benefits under a statutory section held unconstitutional.

STATEMENT

1. The program of Supplemental Security Income ("SSI") for the Aged, Blind, and Disabled, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.*, was enacted to replace several pre-existing cooperative federal-state programs for such individuals with a single, uniform system of welfare benefits administered by the Secretary of Health, Education, and Welfare. The new program guarantees a monthly income to persons who meet federally prescribed income levels and other eligibility criteria.

Section 1614(a)(1)(B) of the Social Security Act, 42 U.S.C. (Supp. V) 1382c(a)(1)(B), restricts eligibility for SSI benefits to United States residents. Section 1611(f) of the Act, 42 U.S.C. (Supp. V) 1382(f), further provides that no person shall be considered eligible for SSI benefits "for any month during all of which such individual is outside the United States." The latter section also establishes an eligibility

test for persons who leave the country for an extended period of time: "after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days."

2. The named appellee, Grace Aznavorian, left the United States to go to Guadalajara, Mexico, on July 21, 1974. When she left the United States, she was receiving SSI benefits. While in Mexico, Aznavorian became ill and was unable to return to the United States until September 1, 1974. Pursuant to the 30-day rule of Section 1611(f),[1] appellant, the Secretary of Health, Education, and Welfare, suspended Aznavorian's SSI benefits for the months of August and September 1974 (App. A, *infra,* pp. 2A–3A).

Aznavorian requested reconsideration of the Secretary's decision, and upon such reconsideration, the Secretary reaffirmed it. A hearing was then conducted at Aznavorian's request. The Hearing Examiner found that under Section 1611(f) Aznavorian was ineligible for SSI benefits during August and September. The Appeals Council approved that decision on September 26, 1975. No other administrative remedies

[1] For convenience, the phrase "30-day rule" is used as a shorthand reference to the provisions of Section 1611(f). It should be stressed, however, that the first sentence of that section precludes payment of SSI benefits for any month during all of which an otherwise eligible recipient is outside the United States. Thus, an individual abroad for the entire month of February could not receive SSI benefits for that month, even if he or she returned to the United States before being absent for 30 consecutive days.

remained to be exhausted. Aznavorian then filed this action, on behalf of herself and all similarly situated persons, challenging the constitutionality of the 30-day rule of Section 1611(f). The district court's jurisdiction was invoked under Sections 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 42 U.S.C. (Supp. V) 1383(c)(3). Aznavorian moved for a class certification and for summary judgment (App. A, *infra*, pp. 1A, 3A–4A).

The district court issued an opinion (App. A, *infra*, pp. 1A–33A) and order (App. B, *infra*, pp. 34A–38A) certifying Aznavorian's suit as a class action[2] and enjoining the Secretary from enforcing the 30-day rule of Section 1611(f). The Secretary was ordered to provide notice of the court's decision to the certified class, and to pay benefits to Aznavorian and to all other class members whose benefits were suspended on the basis of the 30-day rule, but who, in fact, remained United States residents. The court subsequently entered judgment in favor of Aznavorian (App. C, *infra*, pp. 39A–40A).

In invalidating the 30-day rule, the district court reasoned that the rule violates the Fifth Amendment's Due Process Clause because it infringes upon SSI re-

[2] The certified class was defined as:

"All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. § 1382(f) and regulations promulgated thereunder, from September 26, 197[illegible] until the entry of this Order" (App. B, *infra*, pp. 34A–35A).

cipients' "basic constitutional right to international travel." The court held that the rule bears no "fair and substantial relationship" to the legitimate governmental purpose it seeks to achieve, namely, the restriction of SSI benefits to United States residents (App. A, *infra*, pp. 17A, 19A). The court also concluded that class actions are permissible under Section 205(g), and that sovereign immunity does not bar the payment of retroactive benefits to members of the class (App. A, *infra*, pp. 4A–5A, 28A–30A).

THE QUESTIONS ARE SUBSTANTIAL

1. The district court in this case declined to apply the "rational basis" test traditionally employed by this Court in assessing whether social welfare classifications satisfy the requirements of due process and equal protection. See, *e.g.*, *Califano* v. *Jobst*, No. 76–860, decided November 8, 1977; *Weinberger* v. *Salfi*, 422 U.S. 749, 770. This was error. As this Court said last term in *Mathews* v. *DeCastro*, 429 U.S. 181, 185:

> The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering* v. *Davis*, 301 U.S. 619, 640. In enacting legislation of this kind a

> government does not deny equal protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485.

Rather than the "rational basis" test endorsed by this Court in *Mathews* v. *DeCastro*, *supra*, and other similar cases, the district court here employed a so-called "middle" test, not so exacting as the "strict scrutiny" given by this Court to statutory schemes creating "suspect" classifications or involving "fundamental" rights, see, *e.g.*, *Nyquist* v. *Mauclet*, No. 76–208, decided June 13, 1977; *Shapiro* v. *Thompson*, 394 U.S. 618, but nonetheless more rigorous than the "rational basis" inquiry normally applied in social welfare cases (App. A, *infra*, pp. 15A–16A). The intermediate standard, which the district court incorrectly decided should be applied in this case, would require statutory classifications infringing on the right to international travel to bear a "fair and substantial relationship" to a legitimate governmental purpose (*id.* at 16A). The district court derived this test from opinions of this Court in cases involving alleged gender discrimination. See, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71, 76. Whatever may be the appropriate standard of review in such cases, see *Craig* v. *Boren*, 429 U.S. 190, 212-213 (Stevens, J. concurring), the "rational basis" test remains appropriate here, where the challenged statute involves no gender-based

distinction and no classification based upon an accident of birth or infringing upon a fundamental right.

The right to travel internationally is not a "fundamental right" sufficient to trigger strict scrutiny of Section 1611(f). While this Court has recognized the right to travel interstate as a fundamental right derived directly from the Constitution, *e.g.*, *Shapiro* v. *Thompson*, *supra*, it has not granted equal status to international travel. As Mr. Justice Stewart stated, concurring in *Shapiro* v. *Thompson*, *supra*, 394 U.S. at 642–643:

> "The constitutional right to travel from one State to another * * * has been firmly established and repeatedly recognized." *United States* v. *Guest*, 383 U.S. 745, 757. This constitutional right, which, of course, includes the right of "entering and abiding in any State in the Union," *Truax* v. *Raich*, 239 U.S. 33, 39, is *not* a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards.[1]
>
> [1] By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. *Kent* v. *Dulles*, 357 U.S. 116, 125; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505–506. As such, this "right," the Court has held, can be regulated within the bounds of due process. *Zemel* v. *Rusk*, 381 U.S. 1.

Thus, the right to travel abroad may be regulated "under conventional due process or equal protection standards." See also *Mathews* v. *Diaz*, 426 U.S. 67, 85.

Moreover, even if the right to travel internationally could properly be characterized as a fundamental right, strict scrutiny would not be required here because the 30-day rule, while perhaps having the incidental effect of deterring SSI recipients from traveling abroad for more than 30 days, does not directly inhibit or regulate such travel and, indeed, is neutral in its effect on foreign trips of under 30 days. In such circumstances, where the challenged statute affects an allegedly fundamental right only remotely, the rational basis test is appropriate. Cf. *Califano* v. *Jobst, supra* (rational basis test applicable to Social Security classification scheme despite scheme's incidental burden on recipient's right to marry).

The 30-day rule is rationally related to the concededly legitimate congressional purpose of withholding SSI benefits from persons who do not live in the United States. See App. A, *infra,* p. 16A. The 30-day rule serves as an easily administrable demarcation between those SSI recipients who leave the country indefinitely and are not entitled to benefits, and those who leave only temporarily. Without a simple test, such as the 30-day rule, the Social Security Administration would be faced with the formidable task of determining whether each SSI recipient who leaves the United States is abandoning his residence here or is only leaving for a temporary visit or vacation. Congress could reasonably presume that most persons who leave the country temporarily, intending to remain United States residents, will return within 30 days—especially when those persons, like the class members

in this case, are not wealthy and receive most or all of their income from social welfare programs.

Also rationally related to the legitimate purpose of ensuring that SSI recipients are United States residents is the portion of Section 1611(f) which prohibits restoration of SSI benefits to an otherwise eligible individual who has travelled outside the United States for 30 or more consecutive days until that individual has returned to the United States and remained here for at least 30 consecutive days. This provision avoids the anomalous situation in which an otherwise eligible individual could stay outside the United States for extended periods of time and nevertheless receive an SSI check immediately upon each return to the country. The statutory scheme offers a simple means by which a continuing intention to remain a United States resident may be evidenced.

To be sure, the 30-day rule does not provide a perfect method of preventing non-residents from receiving SSI benefits. Nor does it necessarily comprise the best method available for accomplishing that objective.[3] See App. A, *infra,* pp. 18A–19A. However, in the area of social welfare, a statutory classification "does not offend the Constitution simply because the classification 'is not made with mathematical nicety

[3] Section 1611(f) serves several subsidiary purposes. For example, SSI benefits are intended to help the needy within the United States, and accordingly are calculated on the basis of the United States' cost of living. The rule suspending benefits after a recipient has been absent from the country for 30 consecutive days prevents recipients from obtaining "windfall" benefits while taking extended trips to countries where the cost of living is less than it is in the United States.

or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485. Administratively convenient presumptions, such as the 30-day rule, are permissible unless they bear no relationship to reality and are utterly irrational. *Weinberger* v. *Salfi*, 422 U.S. 749, 773–780; see also *Califano* v. *Jobst*, *supra*; *Mathews* v. *DeCastro*, *supra*; *Mathews* v. *Diaz*, *supra*. That is not the case here.[4]

2. Aside from the merits, the district court erred in certifying this lawsuit as a class action. The only possible jurisdictional basis for this lawsuit is Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), as incorporated in Section 1631(c)(3) of the Act, 42 U.S.C. (Supp. V) 1383(c)(3). See *Weinberger* v. *Salfi*, *supra*. As the government has previously argued to this Court, *Norton* v. *Mathews*, No. 74–6212, Section 205(g) manifests a congressional intention to bar class actions.

The statute authorizes the initiation of suit in federal district court only for the purpose of obtaining judicial review of a "final decision of the Secretary made after a hearing to which [the plaintiff] was a party * * *." This language reveals a congressional design to bar class suits and to permit adjudication of individual claims only. Likewise, Section 205(g)

[4] Pending on this Court's appellate docket are two cases from the District of Puerto Rico, *Califano* v. *Colon*, No. 77–126, and *Califano* v. *Torres*, No. 77–88, which invalidated Sections 1611(f) and 1614(e) of the Social Security Act as applied to SSI recipients who move from one of the fifty states or the District of Columbia to Puerto Rico. Section 1614(e), 42 U.S.C. (Supp. V) 1382c(e), defines "United States" as the 50 states and the District of Columbia. Thus, when an SSI recipient moves to Puerto Rico or travels there for over 30 days, his benefits are suspended pursuant to Section 1611(f). The *Colon* and *Torres* courts, employing a "strict scrutiny" analysis, held that this statutory scheme violates SSI recipients' right to travel. The Court's attention is called to *Colon* and *Torres* not because resolution of the issue there in dispute would be dispositive of this case, but only because the statutory provision challenged here is also involved in those earlier cases.

does not empower the district court to grant injunctive relief beyond the particular applicants before the court. *Norton* brief at 12–13, 19–25;[5] *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763 n. 8; *Jablon* v. *Secretary of Health, Education, and Welfare*, 399 F. Supp. 118, 121–124 (D. Md.), summarily affirmed *sub nom. Jablon* v. *Califano*, 430 U.S. 924. Thus, the district court in this case should have confined its relief, if any relief were appropriate, to the particular plaintiff before it, *i.e.*, Aznavorian.

3. Finally, the district court should not have awarded retroactive monetary relief to Aznavorian and, potentially, to members of the certified class. Congress has not waived the government's sovereign immunity for damage suits based on the unconstitutionality of provisions of the Social Security Act. Section 205(g) does not constitute such a waiver; it merely creates a basis for federal jurisdiction. See, *e.g.*, *DeLao* v. *Califano*, 560 F. 2d 1384, 1389–1391 (C.A. 9); *Tatum* v. *Mathews*, 541 F. 2d 161, 165–166 (C.A. 6); *Johnson* v. *Mathews*, 539 F. 2d 1111, 1122–1125 (C.A. 8).

Nor can the substantive provisions of the Social Security Act "'fairly be interpreted as mandating

[5] A copy of the *Norton* brief is being furnished to appellees' counsel. The Court decided that case without reaching the jurisdictional issues raised by the Secretary. 427 U.S. 524.

compensation by the Federal Government for the damage sustained.'" *United States* v. *Testan*, 424 U.S. 392, 400. Indeed, the purpose of this suit was to invalidate the statute to the extent that it suspended appellees' entitlement to SSI benefits. Thus, retroactive monetary relief, which must be viewed as an assessment of money damages against the government, see *Edelman* v. *Jordan*, 415 U.S. 651, is barred by the sovereign immunity doctrine. See *United States* v. *Testan, supra*. See also Brief for Appellant, No. 75–1704, 22–25, *Alexander* v. *Fioto*, 430 U.S. 634.[6] The courts of appeals, relying on *Testan*, have so held in several social security cases. See *DeLao, supra; Tatum, supra; Johnson, supra*.[7]

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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[6] Since the Court in *Fioto* unanimously held that the statutory scheme under which appellee was denied retirement pay for his National Guard service was constitutionally unobjectionable, the Court had no occasion to reach the government's sovereign immunity argument.

[7] The Due Process Clause of the Fifth Amendment does not by itself waive sovereign immunity. *Duarte* v. *United States*, 532 F. 2d 850, 852 (C.A. 2).

APPENDIX A

United States District Court,
Southern District of California

Civil No. 75–1103–GT

[filed August 12, 1977]

OPINION

GRACE AZNAVORIAN, ET AL., PLAINTIFF
v.
JOSEPH A. CALIFANO, JR., ETC., DEFENDANT

I. INTRODUCTION

Pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3),[1] plaintiff seeks review of a final decision, dated September 26, 1975, of the Secretary of Health, Education and Welfare, terminating her Supplemental Security Income benefits for the months of August and September, 1974, pursuant to Social Security Act section 1611(f), 42 U.S.C. § 1382(f). Plaintiff Aznavorian sought to have this action maintained as a class action pursuant to Rule 23 (a) and (b)(2), Federal Rules of Civil Procedure. No facts are in dispute and plaintiff's sole contention is that Section 1611(f) is unconstitutional as being violative of her due process and equal protection rights because it penalized her

[1] While plaintiff's Complaint also sought to invoke additional jurisdiction pursuant to 28 U.S.C. § 1361, injunctive relief, and a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284, plaintiff, by way of stipulation, withdrew without prejudice these additional allegations of jurisdiction.

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right of international travel in violation of the Fifth Amendment to the United States Constitution. Section 1611(f) provides as follows:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for purposes of this title for any month during all of which such individual is outside the United States * * *
>
> For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

The statute creates two classes of equally needy Supplemental Security Income (SSI) recipients, indistinguishable from each other, except that one class has recently traveled outside the United States for more than one month. Because section 1382(f) *conclusively* presumes that traveling class members have abandoned their residence in the United States, the statute terminates their SSI benefits during any calendar month they are outside the country and for the first thirty days following their return.

II. Facts

The uncontested facts in this case are as follows: On July 21, 1974, plaintiff Aznavorian, a United States citizen, resident of San Diego County, and an eligible recipient of Supplemental Security Income benefits, left the United States for health reasons and proceeded to Guadalajara, Mexico, where she sought medical attention. At the time of her departure, she did not intend to remain outside of the United States for more than one month.

While in Mexico, plaintiff Aznavorian became ill and she was unable to return to the United States until September 1, 1974. No evidence indicates that she ever intended to abandon her residence in the United States. As a result of this brief departure, defendant Secretary terminated plaintiff from the Supplemental Security Income program and she was found to be ineligible for any benefits during the months of August and September, 1974, pursuant to Section 1611(f) of the Social Security Act.

There are two parties seeking to intervene. Intervenor Anna Tolstick is an 80-year-old widow who has been residing in New York City, New York, since 1921. Intervenor Tolstick is a recipient of Supplemental Security Income who wishes to visit a sister in Ukraine, U.S.S.R., once more before she dies. Ms. Tolstick would like to travel outside the United States for two months. However, defendant Secretary has advised her by letter that she would automatically lose her SSI benefits during the planned trip and for one month after she returned pursuant to Section 1611(f) of the Act. For that reason, she has not taken her trip and has remained in the United States.

Intervenor Betsabe Rivas, an 80-year-old widow residing in New York City, New York, is in the almost identical situation as Intervenor Tolstick. She is an SSI recipient who wishes to make a last visit to her family in Cali, Colombia. She also received a letter from defendant Secretary indicating that her benefits would be terminated pursuant to Section 1611(f) if she undertook her planned travel abroad. For that reason, she has remained in the United States.

The Court has before it defendant Secretary's Motion for Summary Judgment, plaintiffs' Motion for

Class Certification, and a Motion to Intervene as Plaintiffs brought by Mrs. Tolstick and Mrs. Rivas.

III. Motions for Class Certification and for Clarification

Plaintiff Aznavorian has filed this action on behalf of herself and all similarly situated persons pursuant to Rule 23 (a) and (b)(2), Federal Rules of Civil Procedure. She defines her class as consisting of:

> all individuals eligible for Supplemental Security Income who had such SSI denied, terminated or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. § 1382(f), on September 26, 1975, or at any time thereafter.

As defined, all class members are properly before this Court pursuant to 42 U.S.C. § 405(g) as they have all received "final decision" from defendant Secretary.[2]

Defendant Secretary contends class relief is not available under section 405(g). The Supreme Court in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), did not foreclose, but to the contrary, implied that class relief is available to a court exercising section 405(g) jurisdiction. *Salfi* denied class relief not because anything

[2] The relevant section of the Act, Section 205(g), 42 U.S.C. § 405(g), reads as follows: "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision * * *"

in section 405(g) precludes this form of relief, but because the class was improperly formed in the specific setting of that case.[3] 422 U.S. at 764. The Court in *Salfi* recognized that where the sole challenge is to the constitutionality of a statutory requirement, something over which the defendant Secretary has no jurisdiction, further exhaustion beyond an initial determination "would not merely be futile * * * but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Weinberger* v. *Salfi, supra,* 422 U.S. at 766.

In *Mathews* v. *Eldridge,* 424 U.S. 319, 328 (1976), the Supreme Court held:

> Salfi identified several conditions which must be satisfied in order to obtain judicial review under § 405(g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite, grant of subject-matter jurisdiction * * *." 422 U.S., at 764[9] (Footnote omitted). Implicit in *Salfi,* however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision

[3] Class relief was denied in *Salfi* because unnamed members of the class had not satisfied one of the three statutory requirements for judicial review of an adverse decision by the Secretary. The class as defined in the instant case properly accounts for the exhaustion concerns embodied in § 405(g) and discussed in *Salfi*.

> by the Secretary is clearly required by the statute.

The "waivable [jurisdictional] element", that a "final decision" be rendered to satisfy the statutory exhaustion requirement, in some cases will not be left to the "deference [of] the agency's judgment * * *" *Id.*, at 330. The plaintiff in *Eldridge* conceded that he did not exhaust the administrative procedures provided by the Secretary. *Id.*, at 330.

The fact that full exhaustion of administrative remedies is not required when the plaintiffs challenge denials and/or terminations solely on alleged statutory or regulatory constitutional infirmities was again recognized in *Mathews* v. *Diaz,* 426 U.S. 67 (1976), and *Norton* v. *Mathews,* 427 U.S. 524 (1976). The Court noted in *Diaz*:

> None of the appellees completely exhausted available avenues for administrative review. Nevertheless, the Secretary acknowledged that the applications of Diaz and Clara raised no disputed issues of fact and therefore the interlocutory denials of their applications should be treated as final for the purpose of this litigation. *Id.,* at 72.

Cf., Weinberger v. *Wiesenfeld,* 420 U.S. 636, 641 n. 8 (1975). The decisions in *Jimenez* v. *Weinberger,* 523 F. 2d 689, 695–696, n. 10 (7th Cir. 1975), *cert. denied,* 417 U.S. 628 (1976), and *Tatum* v. *Mathews,* 541 F. 2d 161, 163–164 (6th Cir. 1976), interpret the "final decision" requirement consistent with *Eldridge* and *Salfi* as requiring no more than in initial adverse decision. *Cf., Ellison* v. *Califano,* 546 F. 2d 1162, 1164 (5th Cir. 1977). The plaintiff class herein is defined as including only those persons who have received an explicit decision denying, interrupting or terminating their

benefits based solely on the terms of the challenged statute.[4]

A. THE REQUIREMENTS OF RULE 23(a) ARE SATISFIED

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Defendant Secretary's responses to plaintiff's interrogatories have provided information clearly resolving the "numerosity" issue in favor of class certification. Defendant stated that he did not have available the precise total number of class members whose SSI benefits were denied, interrupted or suspended solely pursuant to § 1611(f). He did submit an approximation indicating that between 4,823 and 9,195 persons were deprived of their SSI benefits per month from February to October, 1976. Numerosity of the class makes joinder of all members impracticable.

There are questions of law or fact common to the class satisfying Rule 23(a)(2).. The primary issue presented by plaintiff's challenge herein is whether Section 1611(f) violates the plaintiff's Fifth Amendment right to travel. The challenged statute denies benefits to plaintiff and her class on a common factual basis—their absence from the United States for more than 30 consecutive days and/or one calendar month. The requirements of Rule 23(a)(2), requiring common question of law or fact, are therefore satisfied. *Jimenez* v. *Weinberger, supra,* 523 F. 2d at 699.

The requirement of Rule 23(a)(3), that the claims of the named plaintiff be typical of the claims of the

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[4] Defendant Secretary additionally concedes that "[i]f, indeed class actions are possible under the Social Security Act * * * then defendant has no objection to the definition of the proposed class." [Def.'s Br. in Oppos. to Plaintiff's Motion for Class Action Certification, at p. 1.]

class, are likewise satisfied. *Gonzales* v. *Cassidy,* 474 F. 2d 67, 71 n. 7 (5th Cir. 1973). All members of the class will benefit by the suit and the requirement of typicality has been met. *Eisen* v. *Carlisle and Jacquelin,* 391, F. 2d 555 (2d Cir. 1968), *aff'd in part,* 417 U.S. 156 (1974).

Finally, the fourth requirement of Rule 23(a), that the "representative parties will fairly and adequately protect the interests of the class," is satisfied. Plaintiff's counsel are employed by various legal services programs and are experienced in Social Security and Supplemental Security litigation and federal court class actions. The plaintiff does not have interests antagonistic to the class since they share identical interests. *See, Wetzel* v. *Liberty Mutual Insurance Co.,* 508 F. 2d 239, 247 (3rd Cir.), *cert. denied,* 421 U.S. 1011 (1975).

B. THE REQUIREMENTS OF RULE 23(b) ARE SATISFIED

The class further satisfies the requirements of Rule 23(b)(2), in that defendant Secretary applies the challenged statute in a similar manner to the entire class. Rule 23(b)(2) is applicable when the party opposing the class has acted or refused to act on grounds generally applicable to the class.

The United States Court of Appeals for the Ninth Circuit in a recent decision provided additional guidance on the question whether notice must be given to identifiable class members in a Rule 23(b)(2) class action. *Souza* v. *Scalone,* No. 74-3485 (9th Cir. January 3, 1977).[5] The court in *Souza* indicated that:

[5] The Court in *Souza* set forth the criteria, originally adopted in *Elliott* v. *Weinberger,* F. 2d (9th Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976), for determining the circumstances under which notice to class members is necessary to assure conformity to the requirements of due process.

> Only when the purposes in providing class members an opportunity [1] to signify whether representation by named plaintiffs is fair and adequate or [2] to intervene to present additional claims or [3] otherwise come into the action to, for example, submit views as amici curiae, are in need of being served, does due process require some sort of notice to absent members of a [Rule 23] (b)(2) class.

The *Elliott* Court determined that none of these "special circumstances" existed in challenging the constitutionality of Social Security recoupment procedures. The Ninth Circuit therefore affirmed the certification of a nationwide class without providing prejudgment notice. The same is true here.

The plaintiffs here are represented by skilled and experienced counsel who are familiar with Social Security class actions. There is no significant factual dispute and the only issues raised are constitutional. Additional claims are not needed; they would only complicate and protract this matter. The plaintiff is typical of the class and additional plaintiffs are unnecessary. Lastly, the constitutional issues have been thoroughly briefed and amici curiae argument is not needed. For the foregoing reasons, prejudgment notice to absent class members is not required. The postjudgment notice to absent class members is not required. The postjudgment notice directed in the class relief order adequately insures that all absent class members will receive complete protection of their claims for SSI benefits.

THE CLASS IS NOT OVERBROAD

In defendant's response to plaintiff's proposed order granting class relief, the defendant for the first time raises objection to the venue for a nationwide class. This action is appropriately a matter calling for certification of a nationwide class. More importantly, objections to improper venue must be raised in the first responsive pleading, or they are waived. Federal Rules of Civil Procedure 8(c), 12(b), 12(h)(1). The venue provision of § 405(g) is no exception; it can be waived if not timely raised. *Weinberger* v. *Salfi, supra.* 422 U.S. at 764

The complaint was filed on November 25, 1975. The Secretary answered on February 20, 1976, without raising any venue objections. There were a number of subsequent motions and hearings prior to the Secretary contending for the first time in his March 31, 1977 response that venue is improper for any class member outside this judicial district. He has waited too long to raise this issue; his objection has been waived.

IV. Motion to Intervene

The applications of Intervenors Tolstick and Rivas are hereby denied, without prejudice, because they have not presented a "claim" to the Secretary, following loss of their benefits. This is a non-waivable requirement. *Mathews* v. *Eldridge, supra,* 424 U.S. at 328. Intervenors, both SSI recipients, communicated in writing with defendant Secretary concerning their need for continued receipt of their SSI benefits while traveling abroad for two months. They received written responses indicating that if they took their planned trips their SSI benefits would be suspended or terminated due to application of section 1611(f).

This does not constitute a "claim." They have not yet been injured by application of section 1611(f).

Intervenors renewed their motion for intervention alleging that they had already suffered constitutional injuries because of defendant's threatened enforcement of § 1611(f) and that their claims presented actual controversies appropriate for declaratory judgment. They alleged jurisdiction upon 5 U.S.C. §§ 701–706 (Administrative Procedure Act), 28 U.S.C. §§ 1343(4) or 1331, in addition to 42 U.S.C. § 405(g). In their renewed applications intervenors alleged that they had not taken their planned trips due to the defendant's threatened termination of their SSI benefits. They further allege that defendant Secretary's stipulation, that intervenors have no available administrative remedies prior to an actual suspension of benefits pursuant to section 1611(f), coupled with the earlier written responses of defendant as to the threatened loss of benefits, constitutes a "final decision" for § 405(g) jurisdiction.

The position of intervenors has not changed since their initial applications for intervention. They have not yet submitted a "claim," nor have they been injured by application of section 1611(f), and this court therefore lacks subject-matter jurisdiction.

V. Motion for Summary Judgment and Reconsideration

It is time to turn to the merits of this action. The effect of Section 1611(f) is to create a conclusive presumption of abandonment of United States residency upon any departure exceeding one calendar month. The section further precludes an applicant or recipient from restablishing residency until he has been

back in the United States for 30 consecutive days following a trip outside of the United States for 30 consecutive days.[6] United States residency is a requirement for SSI eligibility.[7]

By the very terms of section 1611(f), a presumption of abandonment of residency is created for any departure from the United States which last one calendar month or longer. A person traveling outside of the United States for the prescribed period of time loses SSI benefits regardless of the intent of the traveler to maintain a United States residence, the reasons for remaining outside the country for more than the prescribed period, or existence of evidence showing that United States residency has not in fact been abandoned.

The fundamental attack directed at section 1611(f) by the plaintiff concerns the constitutional right to travel. The first issue to be confronted is the test to be applied in assessing the constitutionality of the statute.

The right to travel beyond the frontiers of the United States is a basic constitutional right. *Kent* v. *Dulles,* 357 U.S. 116, 125 (1958); *Aptheker* v. *Sec. of*

[6] Plaintiff initially argued that the second portion of section 1611(f) was only triggered after a recipient had been outside of the United States for one calendar month. The court finds that the 30-day residency requirement contained in the second portion of section 1611(f) applies to applicants and recipients, and operates independently of the abandonment of residency provision contained in the first portion of section 1611(f). However, the issue here concerns those already on SSI and whether there is a sufficient reason to have them cut off from those benefits upon travel abroad that exceeds one calendar month.

[7] 42 U.S.C. §§ 1382(a)(1), (a)(2); § 1382c(a)(1)(B).

State, 378 U.S. 500, 514 (1964); *Zemel* v. *Rusk,* 381 U.S. 1, 14 (1965); *United States* v. *Davis,* 482 F. 2d 893, 912 (9th Cir. 1973). Defendant Secretary urges that "[t]he proper standard of review in a case involving the right to travel abroad is the 'rational basis test.'" Defendant argues that the "rational basis test" has traditionally been applied to legislation in the area of social welfare. *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Richardson* v. *Belcher,* 408 U.S. 78 (1971); *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). However, these cases are not controlling because § 1611(f) implicates constitutionally protected conduct and must, therefore, be measured against a test more exacting than the "rational basis" standard urged by defendant.

While plaintiff Aznavorian was not deterred from traveling, she was, by the later loss of the funds by which she obtains the basic necessities of life, penalized for exercising her constitutional right to international travel. *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 259 (1974). The Supreme Court has specifically noted that judicial scrutiny is triggered by a penalizing of the right to travel, regardless of whether or not travel was actually deterred. *Dunn* v. *Blumstein,* 405 U.S. 330, 339–340 (1972). SSI benefits provide the means for purchasing the "basic necessities of life," and, as noted in *Memorial Hospital* v. *Maricopa County, supra,* 415 U.S. at 259, "[i]n *Shapiro,* the Court found denial of the basic 'necessities of life' to be a penalty."

Right to travel *interstate* has been recognized as a fundamental right necessitating application of the "strict scrutiny" test. *Shapiro* v. *Thompson,* 394 U.S.

618 (1969). Defendant contends that the right to travel abroad has not been given the same degree of protection and directs this court's attention to the concurring opinion of Justice Stewart in *Shapiro* v. *Thompson, supra* at 643 n. 1:

> By contrast, the "right" of international travel has been considered to be more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. *Kent* v. *Dulles,* 357 U.S. 116, 126; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505–506. As such, this "right," the Court has held, can be regulated within the bounds of due process. *Zemel* v. *Rusk,* 381 U.S. 1.

The Supreme Court has not clearly spoken regarding the degree of protection to be afforded international travel. Lower court decisions have indicated that the right to travel abroad is a fundamental right. *United States* v. *Davis, supra,* 482 F. 2d at 912; *Gautier Torres* v. *Mathews,* 426 F. Supp. 1106 (D. Puerto Rico, 1977). The *Gautier Torres* case was decided by a three-judge panel and held that § 1611(f) [the statute involved in the instant case] was unconstitutional because it impaired the fundamental right to travel internationally. This Court declines to follow the same path as the Court in the *Gautier Torres* case, although the end result is essentially the same.

In *Kent* v. *Dulles, supra,* 357 U.S. at 126, the Court stated:

> Freedom of movement across frontiers in either direction and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

Personal rights cannot simply be recognized as "fundamental" or not "fundamental." It is not that simple; obviously some rights are more significant than others. The right to travel abroad is certainly a very important right. However, it should not be placed on equal footing with the right to travel interstate. International travel has traditionally been subject to more controls than has interstate travel. For example, a passport must normally be obtained for travel to most countries and in some instances the government has legitimately imposed complete restriction on travel to certain countries for reasons of national security. On the other hand, the Supreme Court has certainly implied that infringement on this travel right is deserving of much closer scrutiny than that given under the "rational basis" test. *Kent* v. *Dulles, supra; Aptheker* v. *Sec. of State, supra; Zemel* v. *Rusk, supra.*

The protection afforded various rights is a matter of degree. As noted above, the right to international travel is a basic constitutional right and the interest of the government in restricting such travel must be "legitimate and substantial" and cannot be pursued by means that broadly stifle fundamental personal liberties when the ends can be more narrowly achieved. *Aptheker* v. *Sec. of State, supra,* 378 U.S. at 508. The Supreme Court has utilized a middle ground or middle standard, in dealing with classifications premised on sex. *Reed* v. *Reed,* 404 U.S. 71 (1971). The standard adopted in the *Reed* case is appropriate in the instant case where a basic right is involved, but it is not within the class of rights given full "strict scrutiny"

protection. The statute must bear a fair and substantial relationship in fact to the governmental purposes that it seeks to achieve. *Reed* v. *Reed,* supra, at 76.[8]

The purpose of the statute here challenged is, according to defendant Secretary, to avoid payment of SSI benefits to nonresidents of the Country. Plaintiff concedes, and the Court agrees, that this is a legitimate purpose. *Shapiro* v. *Thompson, supra; Memorial Hospital* v. *Maricopa County, supra.* However, while the objective of limiting SSI payments to bona fide residents may be laudable, the Court finds

[8] The court recognizes that the Supreme Court in *Reed* professed to only be applying a rational basis review. But subsequent Supreme Court cases applying *Reed* have borne out the view of legal commentators that *Reed* established a "middle ground" standard of review for sex classifications falling somewhere between rational basis and strict scrutiny. *Frontiero* v. *Richardson,* 411 U.S. 677, 690 (1973); *Stanton* v. *Stanton,* 421 U.S. 7 (1975); *Craig* v. *Boren,* 97 S. Ct. 451 (1976). *See geenrally* Gunther, The Supreme Court, 1971 Term, Forward In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection, 86 Har. L. Rev. (1972).

The choice of the *Reed* standard finds support in the *Aptheker* right to international travel case, in which the Supreme Court appears to have foreshadowed the adoption of a middle ground test when it quoted from the criteria enunciated in *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960):

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

The *Aptheker* court went on to state:

> At the same time the Constitution requires that the powers of government "must be so exercised as not, in attaining a permissible end, unduly to infringe" a constitutionally protected freedom. *Cantwell* v. *Connecticut, supra,* at 304. *Id.,* at 509.

that the means adopted to effectuate the end do not bear a fair and substantial relationship to the purpose sought to be achieved. As noted by the Supreme Court in *Aptheker,* even if the government purpose is both legitimate and substantial, that purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when * * * less drastic means [are available] for achieving the same basic purpose." *Aptheker* v. *Sec. of State, supra,* 378 U.S. at 508.

Defendant Secretary has alleged that section 1611(f) prevents the fraudulent receipt of SSI by nonresidents by establishing an administratively convenient, objective test of residency. Congress has a valid interest in preserving the limited fiscal resources available for SSI payments. However, administrative convenience alone is not a substantial enough reason to justify penalizing the basic constitutional right to international travel. *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975). The Supreme Court in *Memorial Hospital* v. *Maricopa County, supra,* 415 U.S. at 267, rejected the government's argument that the waiting period was a "convenient rule of thumb to determine bona fide residence." *See also Reed* v. *Reed, supra,* 404 U.S. at 76; *Shapiro* v. *Thompson, supra,* 394 U.S. at 636.

Despite its penalizing effect, section 1611(f) does not bear a fair and substantial relationship to its purpose of preventing fraud. As noted by the Supreme Court in *Maricopa County,* in response to a government claim that the durational residency requirement prevented fraud, the dishonest applicant/recipient could just as easily swear to having fulfilled the requirement as not. 415 U.S. at 268. Defendant here claims, maybe correctly, that certain SSI recipients/applicants will not be honest about their residency

and, therefore, an objective test is required. Without some bright-line rule, the defendant argues, a hearing on the facts would have to be made in each case. But a recipient/applicant could just as easily be dishonest in providing information required to apply this objective test. The fraud-prevention aspect of section 1611 (f) can further be defeated by the recipient simply entering the United States for one day during the calendar month or thirty consecutive day period that would otherwise trigger a suspension of benefits. 20 C.F.R. 416.325.

A legitimate government purpose cannot be pursued by means that broadly stifle the right to travel internationally when there are effective and less drastic means available. The means must be considered in light of the purpose of the SSI program. The purpose is to provide benefits to the old-age, the blind, and the totally disabled based on a sympathetic understanding of the needs of the helpless. *Cardinale* v. *Mathews,* 399 F. Supp. 1163, 1164 (D.D.C. 1975).

Less drastic means are available and are employed to determine fraudulent claims for benefits. Other sections within the Social Security Act have been established for the specific purpose of preventing fraud. *See, e.g.,* 42 U.S.C. § 1383(e)(1)(B) (requiring verification of information received from an applicant/recipient); 42 U.S.C. § 1382(e)(3) (requiring the monitoring of all recipients); 42 U.S.C. § 1383 (b) (requiring repayment to the program of overpayments received by recipients); and, 42 U.S.C. § 1383a (delineating penalties for various fraudulent acts leading to the wrongful receipt of benefits.) "[L]ess drastic means are available, and are employed," to minimize the hazard of fraud. *Shapiro* v. *Thompson, supra,* 394

U.S. at 637; *Aptheker* v. *Secretary of State, supra,* 378 U.S. at 508.

Section 1611(f) does not bear a fair and substantial relationship to its avowed purpose of limiting SSI payments to bona fide residents of the United States. The requirement of residency, separately established by 42 U.S.C. § 1382c(a)(1)(B), *supra,* and the conclusive loss of residency and subsequent 30-day waiting period required by section 1611(f) to regain residency, are "distinct and independent prerequisites for assistance." *Shapiro* v. *Thompson, supra,* 394 U.S. at 636. Defendant concedes that he maintains no statistics to substantiate his assertion that the one month or 30-day travel period is substantially related in fact to abandonment or establishment of residency.

Utilizing objective factors, such as continued ownership or rental of a home, continued employment in the United States membership in organizations, and the purpose for the trip, would be far more effective in avoiding sham residency claims than relying solely on the recipient's or applicant's assertions concerning the lengths of time spent in or out of the country. Defendant already employs such a multi-factor residence test in making initial determinations of residency in processing SSI applications.[9] In short, "[L]ess drastic means are available, and are [or can be] employed," to minimize fraud and ensure that SSI is not paid to nonresidents of the United States. *Shapiro* v. *Thompson, supra,* 394 U.S. at 637; *Aptheker* v. *Sec. of State,* 378 U.S. at 508.

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[9] As noted in the SSI Claims Manual, Section A2101, "a person becomes a resident when he arrives in one of the fifty states * * * with the intent to establish his home there * * * the intent may be inferred from such actions as arranging for rental or purchase of a dwelling * * *"

Defendant concedes that section 1611(f) creates two classes of needy persons, indistinguishable from each other except that one has remained in the United States, while the other has been outside of the United States for one month. Recipients of SSI benefits are forced to abandon a constitutional right to travel that non-recipients retain without penalty. As already noted, the Court finds that section 1611(f) does not bear a fair and substantial relationship to the governmental purpose of preventing SSI payments to non-residents. The blanket and conclusive exclusion of recipients and applicants who travel for 30 days or more from the SSI program is not fairly and substantially related to the prevention of false residency claims. The section, therefore, violates the equal protection rights of those SSI recipients who are penalized by its terms. *Jimenez* v. *Weinberger*, 417 U.S. 628, 636 (1974).[10]

For all of the above reasons the Court finds that Section 1611(f) imposes an unconstitutional infringement on plaintiff's right to travel outside of the United States. The Court finds that denial of SSI benefits to plaintiff during the time that she was outside of the United States and during the first 30 consecutive days following her return violated her Fifth Amendment right to equal protection and due process of law.[11]

[10] It is conceded by defendant that the Equal Protection clause of the Fourteenth Amendment finds similar life in the Fifth Amendment due process guarantee. *Bolling* v. *Sharp*, 347 U.S. 497 (1954).

[11] Defendant admits that "Section 1611(f) of the Act challenged by plaintiff does, indeed, create an irrebuttable presumption." Plaintiff Aznavorian argues that Section 1611(f) "indiscriminately excludes plainly relevant considerations" (*Aptheker* v. *Secretary of State*, *supra*, 378 U.S. at 514) and thereby creates an inaccurate conclusive presumption of non-residency amounting to a violation of her due process rights under the Fifth Amendment. Having found that section 1611(f) is unconstitutional as an undue infringement on the international right to travel and that it violates the equal protection rights of that category of SSI recipients affected by its terms, the Court finds it unnecessary to reach the conclusive presumption argument presented by plaintiff.

Defendants Motion for Reconsideration

Following oral rulings and comments of this Court, defendant Secretary filed a Motion for Reconsideration in which he largely reiterated his prior arguments that the proper test for constitutionality of section 1611(f) is the "rational basis" test. *Sosna* v. *Iowa*, 419 U.S. 397 (1975). Defendant also argues that an SSI recipient abroad may encounter circumstances that change his eligibility status.[12] Finally defendant argues that the 30-day residency requirement activated upon a person's return to the United States "allows a stabilization period for income and resources following an extended time out of the United States." [Supplemental Memorandum in Support of Motion for Summary Judgment, at p. 12.]

Sosna distinguished *Shapiro* v. *Thompson*, *supra*, and *Memorial Hospital* v. *Maricopa County*, *supra*, stating that, unlike in *Sosna*, there "the durational residency requirements * * * were justified on the basis of budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional

[12] Examples of such changes in eligibility include: (1) Recipient living in the house of another and receiving in kind income in the form of support and maintenance results in an automatic one-third reduction in monthly benefits (42 U.S.C. § 1382(a)(2)(A)); (2) Gifts received by the recipient may effect eligibility (70 C.F.R. §§ 416.1136 and 416.1157); (3) Certain forms of income in specified amounts effect eligibility (42 U.S.C. § 1382a).

claims of the individuals." *Sosna* v. *Iowa, supra,* 419 U.S. at 406. Furthermore, in *Sosna* the Court found that important considerations, other than "administrative convenience", allowed the state to require that a person have a modicum of attachment to the State. *Id.,* at 406–407. Finally, the challenged statute in *Sosna* did not act as a penalty. It merely delayed the exercise of interests in marriage/divorce. *Sosna* therefore does not provide authority for the application of the traditional "rational basis" test in this case.

Plaintiff's class is made up of persons who have traveled but who retain their residence in the United States. All of the reporting and verification requirements of the Social Security Act remain intact and available whether or not a recipient or applicant decides to travel abroad.

Defendant contends that the multi-factor residence test [13] will not work when an individual is traveling outside the United States. The defendant Secretary asks what it proves regarding residency if someone still retains a dwelling in the United States; they could still be residing outside the United States. Defendant is painting an unrealistic picture. These benefits go to needy and disabled people; they are not the type of people who can maintain local residence for the sole purpose of receiving SSI benefits while actually living abroad.

Further, defendant already maintains a complete system for administering SS benefits in almost every country of the world. Social Security Claims Manual §§ 3608–3663. This system could apply to SSI. However, the need to contact recipients in foreign countries will not arise in most cases, since SSI recipients will

[13] See n. 8, *infra.*

report their travel plans to defendant before they leave the United States if they hope to continue to receive their checks while traveling. Only recipients abroad too long might warrant a foreign investigation.

Finally, defendant argues that the 30-day residency requirement provides a "stabilization period" for income and resources following a trip abroad. Once again, mere administrative convenience cannot justify the penalizing effect of section 1611(f). *Shapiro* v. *Thompson, supra; Memorial Hospital* v. *Maricopa County, supra.* The burden of proof remains on the recipient/applicant to establish eligibility and produce documentary evidence when required.[14]

The defendant's arguments presented for reconsideration are not persuasive.

VI. Relief

In further hearings held on April 11, 1977, concerning the nature of the order granting class relief, defendant Secretary contends that the judgment of this Court should not be applied retroactively for two reasons: (1) Under the traditional retroactivity test, there can only be prospective application; (2) Retroactivity is barred under sovereign immunity.

A. Retroactivity Under "Chevron Oil v. Huson"

Defendant asserts that based on the retroactivity criteria set forth in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), any remedy ordered by this Court

[14] Social Security Act § 1631(e)(1)(B); Claims Manual § 12107 (applicant/recipient must provide some evidence), § 12130 (claim denied if individual refuses to consent to outside contact); 42 U.S.C. § 1383(b)(c), 20 C.F.R. 416.538 and 416.558(a) (for determining, preventing (and recouping SSI overpayments).

should have prospective application only. He cites also to *Tatum* v. *Mathews,* 541 F. 2d 161 (6th Cir. 1976), and *Johnson* v. *Mathews,* 539 F. 2d 1111 (8th Cir. 1976), in support of his claim.

Defendant incorrectly argues that *Tatum* and *Johnson* preclude the requested class relief. Both cases were class actions challenging SSI statutes which terminated benefits without prior notice or hearing, and held that these statutes violated the Fifth Amendment. Although denying *automatic payment* of SSI benefits unconstitutionally terminated to the class, each Circuit applied its opinion retroactively to the class in two ways: (1) all class members were entitled to have their benefits reinstated until given a hearing on the termination facts (*Tatum* v. *Mathews, supra,* 541 F. 2d at 163); *Johnson* v. *Mathews, supra,* 539 F. 2d at 1114); and (2) all class members were entitled to receive all benefits withheld prior to the court decision if they proved successful at their hearings. *Johnson* v. *Mathews, supra,* 539 F. 2d at 1125, specifically states:

> * * * [T]he plaintiff and the members of the class can recover all of the benefits withheld should they prevail upon review of the initial determination of ineligibility. *See* 42 U.S.C. § 1383(b). The government concedes as much in its supplemental brief.

See also Tatum v. *Mathews, supra,* 541 F. 2d at 166 n. 5. Neither Circuit perceived any problem under *Chevron Oil;* indeed neither Circuit even mentioned that Supreme Court case.

Plaintiff's requested class relief seeks only the remedy provided by *Tatum* and *Johnson;* an opportunity to prove that class members did not in fact abandon their residences during their brief trips outside the country. Only those class members who did not *in fact* abandon their residences would be entitled to recover the SSI unconstitutionally withheld, just as in *Tatum* and *Johnson.*

The Supreme Court in *Chevron Oil* set forth the following:

> In our cases dealing with the non-retroactivity question, we have generally considered three separate factors. *First,* the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, (cites omitted), or by deciding an issue of first impression whose resolution was not clearly foreshadowed, (cites omitted). *Second,* it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (Cites omitted.) *Finally,* we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' (Cites omitted.) 404 U.S. at 106–107. (Emphasis added.)

Jimenez v. *Weinberger, supra,* 523 F. 2d 689, is the only Social Security decision considering the *Chevron Oil* retroactivity factors, and *Jimenez* clearly supports the class relief requested here.[15] While the *Jimenez* court recognized the Supreme Court's decision in-

[15] The Seventh Circuit's decision in *Jimenez* directed a far more drastic remedy than plaintiffs request here: *automatic retroactive payments* to class members denied children's insurance benefits pursuant to the statute there ruled unconstitutional.

validating 42 U.S.C. § 416(h)(2)(A) (417 U.S. 638 (1975)) did establish a "new principle of law" under *Chevron Oil* factor (1), the *Jimenez* court held that *Chevron Oil* factors (2) and (3) mandated retroactive benefits to all class members. *Id.* at 703. The *Jimenez* analysis applies to the class relief requested here.

This Court agrees with defendant that a decision declaring section 1611(f) of the Social Security Act unconstitutional would establish a "new principle of law" not clearly foreshadowed by past decision. However, defendant Secretary fails under the second and third factors of *Chevron Oil*. The purposes behind the SSI program support the relief requested. As described in *Cardinale* v. *Mathews,* 399 F. Supp, 1163, 1164 (D.D.C. 1975),

> [t]he [SSI] program was designed to *provide positive assurance* that the nation's aged, blind, and disabled would *no longer have to subsist on below-poverty-level incomes.* (Citations omitted.) Congress recognized that aged, blind, and disabled individuals may be in need notwithstanding Social Security benefits, Veterans' Administration benefits, or even private pension benefits. SSI was intended to supplement those other sources of income *to free the poor from want and the indignities of poverty.* (Emphasis added.)

The needy have been unconstitutionally denied these benefits. The denial of these benefits necessarily required the plaintiff class members to consume other assets in order to attempt to maintain their standard of living, while at the same time exercise their right to travel. These people are still needy, maybe even more so for having taken their trips abroad, and so surely the retroactive payment of such benefits furthers,

rather than impedes, the effectuation of the purposes of the SSI program.[16]

As with Title II, Title XVI [SSI] contains a statute permitting retroactive recovery of wrongfully denied SSI benefits, 42 U.S.C. § 1383(b). That statute authorizes recovery of underpayments; there is no requirement that such denials have been willful; any mistaken denial will give rise to such recovery. *See Jimenez* v. *Weinberger, supra,* 523 F. 2d at 703–704 (relying on parallel provisions in Title II of Social Security Act, 42 U.S.C. § 404). Thus, like Title II recipients, Congress intended that Title XVI beneficiaries "receive the full and correct amount of their entitlement, even if this requires payments to be made long after the period of entitlements." *Id.,* 523 F. 2d at 703.

Turning to the third factor of the *Chevron Oil* case, this Court finds that the requested class relief will not produce "substantial inequitable results." On the one hand, substantial equities favor affording plaintiffs the opportunity of proving that defendant unconstitutionally and incorrectly denied their SSI benefits. On the other, there is defendant's apparent concession that the requested class relief will not "necessitate a reduction in the scope of persons benefitted by [the SSI program]." *Jimenez* v. *Weinberger, supra,* 523 F. 2d at 704. Instead, defendant only makes an assertion

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[16] This is premised on the idea that past benefits owed should go to those who are still *presently needy*. Those *no longer needy*, even if they were needy at the time they took their trip, would not need the past benefits to meet their *current* needs as envisioned under the goals of the program. This will be explored more fully in defining the scope and method of relief available to plaintiff's class.

that "[t]he administrative burden involved would outweigh any benefits which would result" from the requested class relief. [Def. Brief Class Relief at 6, lines 12–13.] Decisions within the Ninth Circuit reject this assertion as a basis for denying class relief. *Jen Cuk* v. *Brain,* 355 F. Supp. 134, 136 (N.D. Cal. 1972). If courts denied retroactive relief because of increased administrative costs alone, the government would never be compelled to repay benefits to which recipients were later found entitled.

For all these reasons, the requested class relief is not barred by any principle against retroactivity of judicial decisions.

B. RETROACTIVITY AND SOVEREIGN IMMUNITY

It is settled law that the United States, as sovereign, "is immune from suit save as it consents to be sued * * *" *United States* v. *Sherwood,* 312 U.S. 584, 586 (1941). In *United States* v. *Testan,* 424 U.S. 392 (1976), two government attorneys sought job reclassifications under the Classification Act. The Supreme Court held that any award of back pay was barred by sovereign immunity. The Court noted that the Tucker Act, 28 U.S.C. § 1491, which was the basis for jurisdiction, did "not create any substantive right enforceable against the United States for money damages." *Id.* at 398.

Based on the *Testan* case, the two circuit courts in *Johnson, supra,* (8th Cir.) and *Tatum, supra,* (6th Cir.) held:

> As with the Tucker Act, § 405(g) [the jurisdictional statute in the instant case] is only jurisdictional in nature and *cannot itself constitute a waiver of sovereign immunity or* confer the requisite substantive right. Such a waiver and right must be found, if at all, in the statutes creating the SSI program. 539 F. 2d at 1123.

Both *Johnson* and *Tatum* found that Title XVI [SSI] created no substantive right to receive SSI benefits, and thus the plaintiffs' class could not receive retroactive payments. Defendant contends the same should apply here.

This Court need not go into all of the arguments raised by the plaintiff, because this Court, as will be discussed further in the following section of this opinion, grants the plaintiff class the same remedy that the courts in *Johnson* and *Tatum* found appropriate. In *Johnson* and *Tatum,* the circuit courts held that under the facts of those cases, the determination of benefits without a noticed hearing regarding the class members eligibility was unconstitutional. The Secretary was enjoined from denying payments to the plaintiff class from the time of the courts' judgment until the noticed hearing could be held. However, because the courts had held that sovereign immunity barred retroactivity, the plaintiff class was denied automatic back payments for the time from initial cut off of payments until the courts' judgments.

The circuit courts noted that there would be no permanent harm, because if the plaintiff class member showed he was eligible at the noticed hearing then he could recover *all* of the benefits withheld, citing to 42 U.S.C. § 1383(b). *Johnson* v. *Mathews, supra,* 539 F. 2d at 1125.

The same reasoning applies in the instant case. Only those still needy will be effected by this Court's judgment (see following section of opinion). This Court

will be ordering that the decisions denying benefits in the past, based solely on § 1611(f), are void and that the plaintiff class has the right to seek a hearing to show that they were in fact still residents of the United States during the period they were out of the country. If they can make such a showing at the hearing then they can recover retroactive payments for the time they were out of the country, pursuant to 42 U.S.C. § 1383(b). This remedy will satisfy the fears of the defendant Secretary and meets the concerns expressed in *Testan, supra, Johnson, supra* and *Tatum, supra.*

For all these reasons, the contentions of the defendant regarding retroactivity as it relates to sovereign immunity in the factual situation presented here are denied.

C. SCOPE AND METHOD OF RELIEF

Retirement benefits under the Social Security Act are based on the amount of payments made into the Social Security fund by the individual employee and his employer. On the other hand, SSI benefits are based on need. "The [SSI] program was designed to provide positive assurance that the nation's aged, blind, and disabled would no longer have to subsist on below-poverty-level incomes." *Cardinale* v. *Mathews supra,* 339 F. Supp. at 1164.

As was clearly stated in *Rothstein* v. *Wyman,* 467 F. 2d 226, 235 (2nd Cir. 1972), *cert. denied* 411 U.S. 921 (1972):

> * * * Federal standards are designed to ensure that those needs [of impoverished persons] are equitably met; and there may perhaps be cases in which the prompt payment of funds wrongfully withheld will serve that end. As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear.

The purpose of the SSI program is to help those who are *currently* needy. It follows that where there is no need, the goals of the program would not be effectuated by the payment of SSI benefits. Therefore, not all previous recipients of SSI benefits who were denied payments, solely because of § 1611(f) should now receive those lost benefits. The retroactive payments should go to *only* those who were unconstitutionally denied benefits in the past, but who are still *currently needy,* and thus still eligible for SSI benefits. If a person is not presently needy, then there would be no purpose served by granting him retroactive benefits. In such a situation it would appear that the payments would "become compensatory rather than remedial."

The Order to follow this Opinion will limit relief to those members of the certified class who are receiving SSI benefits on the date the Order is entered and to those class members who would be receiving SSI benefits on the date of the entered Order, but for current operation of section 1611(f), 42 U.S.C. § 1382(f).

The plaintiff seeks also to have included all those class members who *could be* eligible to receive SSI benefits on the date the Order is entered, but who had their SSI denied, suspended, interrupted, or terminated pursuant to section 1611(f) and regulations promulgated thereunder during the class period, and *do not have an active application* for SSI on file with defendant. However, it is not evident that these persons fall within the group of persons that the SSI program was designed to benefit. It is of course pos-

sible that many of these persons are indeed needy, but without an active application by them with the Social Security Administration, it would be mere speculation as to their economic status. It would impose a completely unrealistic and undue burden on the defendant to expect him to determine who these persons might be.

The parties agree that residency in the United States is a valid prerequisite to receipt of SSI benefits.[17] The burden is on the recipient/applicant to establish his or her eligibility and produce documentary evidence where required.[18] Consequently when a SSI recipient does depart the United States for more than one month, it would be necessary for the recipient to prove that he or she was still in fact a United States resident during the time he or she was out of the United States. This can properly be accomplished by allowing all class members, previously defined, who have had their benefits denied, suspended, interrupted or terminated under § 1611(f), to have their eligibility for SSI redetermined, without regard to that statute or accompanying regulations. Defendant Secretary will be ordered to prepare and file with this Court a notice informing the class members of this Court's decision and of the opportunity for a redetermination of their denials, suspensions, interruptions or terminations of SSI as a result of § 1611(f).

It is an uncontested fact that plaintiff Aznavorian was a resident during the months of August and September 1974 and therefore she is entitled to receive SSI benefits denied her for those months. Defendant

[17] See n. 7, *infra*.

[18] See n. 13, *infra*.

will be directed to pay those benefits denied to Grace Aznavorian for those particular months.

An Order will immediately follow, incorporating the conclusions contained in this Opinion.

Dated: August 10, 1977.

GORDON THOMPSON, Jr.,
Judge, United States District Court.

Copies to: Victor Harris, Esq., Legal Aid Society, 964 Fifth Avenue, San Diego, CA 92101; Ian Fan, Esq., Peter Schey, Esq., Legal Aid Society, 1760 Euclid Avenue, San Diego, CA 92105; Charles Wolfinger, Esq., Legal Aid Society, 305 Center Street, Chula Vista, CA 92010; Michael Waltz, Esq., Assistant U.S. Attorney.

APPENDIX B

United States District Court, Southern District of California

Civil No. 75–1103–GT

GRACE AZNAVORIAN, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, Jr., ETC., DEFENDANT

[filed August 23, 1977]

ORDER

Consistent with this Court's Opinion filed herewith, and the Court having determined (1) that the class defined below meets the requirements of Federal Rule 23 (a) and (b)(2), and (2) that there is no genuine issue as to any material fact regarding plaintiff Grace Aznavorian's eligibility for Supplemental Security Income (SSI) during August and September 1974, this Court hereby (1) grants the motion for class certification on behalf of the class defined below, (2) grants plaintiffs summary judgment, and (3) grants individual and class relief pursuant to the provisions in this Order because such provisions are necessary to afford all plaintiffs the full legal and equitable relief to which they are entitled.

It is hereby ordered, That:

1. This suit is certified as a class action under 42 U.S.C. §§ 405(g), 1383(c)(3) and Federal Rule 23 (a) and (b)(2) on behalf of the following class:

> All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. § 1382(f) and regulations promulgated thereunder, from September 26, 1975 until the entry of this Order.

2. 42 U.S.C. § 1382(f) and regulations promulgated thereunder are declared in violation of the due process clause of the Fifth Amendment to the United States Constitution and therefore invalid insofar as they cause defendant to suspend, interrupt, terminate, or deny SSI to otherwise eligible individuals solely because they travel outside the United States for one calendar month or thirty (30) consecutive days. Accordingly, 42 U.S.C. § 1382(f) and regulations promulgated thereunder are hereby declared null and void in their entirety.

3. Defendant's decision of September 26, 1975 affirming the suspension of plaintiff Aznavorian's SSI benefits for August and September 1974, pursuant to 42 U.S.C. § 1382(f) and regulations promulgated thereunder, is hereby reversed. Plaintiff Aznavorian is entitled to receive the SSI benefits denied her for August and September 1974. Therefore, defendant, his agents, employees and successors are hereby ordered to pay said benefits to plaintiff Aznavorian, within sixty (60) days of this Order's entry.

4. By reason of 42 U.S.C. § 1382(f) and regulations promulgated thereunder being declared invalid, null and void for violating the due process clause of the Fifth Amendment to the United States Constitution, the denials, suspensions, interruptions, and terminations of SSI pursuant to said statute and regulations are hereby reversed and declared null and void for all the following members of the certified class:

> (a) All those class members who *are* receiving SSI benefits on the date this Order is entered;

(b) All those class members who *would be* receiving SSI benefits on the date this Order is entered, but for current operation of Section 1382(f) and regulations promulgated thereunder.

5. All class members identified above in paragraph 4 are entitled to have defendant, his agents, employees and successors redetermine their eligibility for SSI during the time period such benefits were denied, suspended, interrupted or terminated under Section 1382(f) and accompanying regulations, without regard to such statute or regulations, and according to the principles set forth in the Opinion. All such class members who *in fact* were United States residents during such time periods are entitled to receive all SSI benefits withheld under Section 1382(f) and regulations promulgated thereunder.

6. Defendant, his agents, employees and successors are ordered to prepare and file with this Court a notice informing all class members identified above in paragraph 4 of the following:

(a) that this Court has declared Section 1382(f) and regulations promulgated thereunder invalid, null and void under the Fifth Amendment to the United States Constitution;

(b) that this Court has reversed all such class members' denials, suspensions, interruptions and terminations of SSI pursuant to Section 1382(f) and regulations promulgated thereunder, and declared such decisions null and void;

(c) that all such class members, within six (6) months after receiving the notice set forth in this paragraph, are entitled to request defendant, his agents, employees and successors for a redetermination of their denials, suspensions, interruptions or terminations of SSI, without regard to Section 1382(f) or any regulations promulgated thereunder, and pursuant to standards consistent with this Court's Opinion (which shall be stated in the notice);

(d) that all such class members are entitled to all administrative and judicial review of any adverse redeterminations, which would otherwise be available on adverse initial determinations; and

(e) that all such class members, who, on the basis of the proceedings in (c) and (d), are determined to have been United States residents *in fact* during the disqualification period caused by Section 1382(f), and regulations promulgated thereunder, are entitled to receive such SSI benefits.

Defendant, his agents, employees and successors shall file a copy of such proposed notice with the Court and serve a copy on plaintiffs' counsel within thirty (30) days of the date this Order is entered. If plaintiffs' counsel has any objections to defendant's proposed notice, such objections shall be filed with the Court and served on counsel for defendant within thirty (30) days after service of the proposed notice on plaintiffs' counsel. The Court will then approve a notice form, and defendant shall mail it within thirty (30) days to all persons who received SSI benefits at any time from September 26, 1975 to the date this Order is entered.

7. Defendant, his agents, employees and successors are ordered to pay the SSI benefits originally denied pursuant to Section 1382(f), and regulations promulgated thereunder, to all those class members iden-

tified above in paragraph 6(e) within sixty (60) days of a favorable decision in the proceedings set forth in paragraph 6 (c), (d).

8. Defendant, his agents, employees and successors are further ordered to file an affidavit with this Court and serve a copy on plaintiffs' counsel, attesting to timely mailing of the notice defined above in paragraph 6.

9. This Court retains jurisdiction of this cause until all relief herein has been effectuated, and may, if necessary, require defendant, his agents, employees and successors to file reports describing their progress in effectuating said relief.

10. This Court finds no just reason for delaying the enforcement of this Order.

Dated August 19, 1977.

GORDON THOMPSON, Jr.,
Judge, United States District Court.

Copies to: Victor Harris, Esq., Legal Aid Society, 964 Fifth Avenue, San Diego, CA 92101; Charles Wolfinger, Esq., Legal Aid Society, 305 Center Street, Chula Vista, CA 92010; Ian Fan, Esq., Peter Schey, Esq., Legal Aid Society, 1760 Euclid Avenue, San Diego, CA 92105; Michael Waltz, Esq., Assistant U.S. Attorney.

APPENDIX C

United States District Court, Southern District of California

Civil No. 75-1103-GT

GRACE AZNAVORIAN, ET AL., PLAINTIFFS
v.
JOSEPH A. CALIFANO, JR., ETC., DEFENDANT

[filed September 6, 1977]

JUDGMENT PURSUANT TO
RULE 58, FEDERAL RULES OF CIVIL PROCEDURE

This matter came on for hearing before this court, the Honorable Gordon Thompson, Jr., District Judge, presiding, and an Opinion (filed August 12, 1977) and Order (filed August 23, 1977) having been rendered.

It is adjudged, That:

1. The motion for class certification on behalf of the class as defined in the Order, filed August 23, 1977, is granted;

2. Summary Judgment is granted to plaintiffs;

3. individual and class relief are granted pursuant to the provisions in the Order, filed August 23, 1977;

4. and each party shall bear his or her own costs.

Dated: August 31, 1977.

GORDON THOMPSON, Jr.,
Judge, United States District Court.

Copies to: Victor Harris, Esq., Legal Aid Society, 964 Fifth Avenue, San Diego, CA 92101; Charles Wol-

finger, Esq., Legal Aid Society, 305 Center Street, Chula Vista, CA 92010; Peter Schey, Esq., Ian Fan, Esq., Legal Aid Society, 1760 Euclid Avenue, San Diego, CA 92105; Michael Waltz, Esq., Assistant U.S. Attorney.

APPENDIX D

United States District Court, Southern District of California

Civil No. 75-1103-GT

GRACE AZNAVORIAN, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., ETC., DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from the order of the District Court entered in this action on August 23, 1977, and from the judgment of the District Court entered on September 6, 1977.

Dated: September 22, 1977.

TERRY J. KNOEPP,
United States Attorney.
D. MICHAEL WALTZ,
Assistant U.S. Attorney.
Attorneys for Defendant.

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
JUN 14 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-991 and 77-5999

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant

—*v.*—

GRACE AZNAVORIAN, ET AL.

GRACE AZNAVORIAN, ET AL.

Appellants

—*v.*—

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENTS FILED JANUARY 10 AND JANUARY 9, 1978 RESPECTIVELY
PROBABLE JURISDICTION NOTED MARCH 20, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-991 and 77-5999

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant

—*v.*—

GRACE AZNAVORIAN, ET AL.,

GRACE AZNAVORIAN, ET AL.,

Appellants

—*v.*—

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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DOCKET ENTRIES

DATE

11-25-75 Fld Complt (JS-5) Issd summons to U.S. Mars.

1-9-76 Fld return of service of summons as to F. David Mathews—Secretary—Department of Health, Education & Welfare, served 12-22-75.

2-20-76 Fld Defts ANSWER to complt w/ affid of serv. W/ certified copy of Transcript of the record.

3-2-76 Fld order for status conference for 5-28-76 @ 1:30 p.m. (GT) Mld cys.

4-13-76 Fld. summons return fld. 1-9-76 as to F. David Mathews.

4-29-76 Fld. deft's-Mot. to dismiss pltfs. Centro De Accion Social Autonomo & Casa Justicia, National City complt. & for S/J & Not. of mot., deft. brief in support of mot. and Affid. of serv. by mail. Not. for 5-24-76 @ 10:30.

5-4-76 Fld. defts-Memo. submitting attachments to brief in supp. of mot.

5-11-76 Fld. pltfs-Stip. and ord. re cont. of mot. to dimiss or for S/J. Con to 6-28-76 @ 10:30. (GT)

5-13-76 Fld. Pltfs, First set of Interrogs. t/w affid. of serv.

5-28-76 Ent. ord. S/ conducted. cont. to 6-28-76 @ 10:30 for hrg. mots. (GT)

6-9-76 Fld. ord. re S/C. (GT)

6-24-76 Fld. Stipulation and ord. re cont. of mot. to dismiss or in the 1 alternate for S/J cont. to 9-13-76 @ 10:30. (GT)

9-13-76 Ent. ord. mots. hrg. cont. to 10-11-76 @ 10:30am. (GT)

9-15-76 Fld. pltf. stip. and ord. re cont. of mot. to dismiss or in the alternate for S/J. Mot. cont. to 10-11-76 @ 10:30am. (GT)

DATE

10-1-76 Fld. pltff's notice of mot. to intervene as pltff's & mot. notice for 10-12-76 @ 10:30am.
Fld. pltff's not. of mot. and mot. for application for convening a three judge district court.
Filed combined mem. supporting mots. for intervention and application for conv. 3 ct. judge, & opposing deft's mot. to dismiss & for S/J. t/w affid. of serv.

LODGED Pltff's complt. in intervention. Fwrd. to Judge Thompson orig. one copy.

10-7-76 Fld. pltff. stipulation and ord dismissing Centro de Accion Social' Autonomo and Casa Justica. (GT) (Ent. 10-7-76)

10-12-76 Ent. ord. hrg. pltff. mot. to intervene, mot. to convene 3 judge court & mot. to dismiss cont. to 11-7-76 @ 10:30a.m. (GT)

10-21-76 Fld. stipulation for cont. and ord. theron. cont. to 11-1-76 @ 10:30am. (GT) for hrg. mots.

10-26-76 Fld. pltff. supplemental memo supporting mot. for intervention & application for convening. three judge ct. t/w affid. of serv.

10-27-76 Fld. deft. supplemental brief in opposition to convening of a 3-judge court and opposition to pltff. mot. to intervene t/w affid. of serv.

11-1-76 Fld. pltff. addendum to memoranda t/w affid. of serv.

10-29-76 Fld. pltff. reply memo. supportin application for convening 3 judge court & mots. for intervention t/w affid. of serv.

11-1-76 Ent. ord. hrg. mot. cont. to 11-8-76 @ 10:30am. (GT)
Fld. affid. of Jerry J. Bassett.

DATE

11-8-76 Ent. ord. hrg. mot. to intervene as pltff & mot. to dismiss S/J denied. Mot. to convene 3-judge ct. withdrawn. Atty. for pltff to prepared. (GT)
Fld. stipulated withdrawal of application for convening of three-judge court w/ord. theron. (GT)

11-16-76 Fld. pltff. notice of mot. & mot. for class action cert., memo of pts. & auths in support t/w affid, of servc. Ntc. for 11-29-76 @ 10:30am.

11-19-76 Fld. deft. objections to answering pltff. interrogs. t/w affid. of serv.

11-24-76 Fld. pltff. second set of interrogs to deft. t/w affid. of serv.

11-29-76 Ent. ord. hrg. pltff. mot. for class act. certification cont. to 1-20-77 @ 10:30am. (GT)

12-7-76 Fld. deft. stipulation for cont. of pltff. mot. to certify class action be cont. to 1-10-77 @ 10:30am. w/ord. theron. *(GT)

12-13-76 Fld. deft. notice of mot. & mot. to reconsider, memo of pts. & auths in support. of mot. Ntc. for 1-10-76 @ 10:30am. t/w affid. of serv.

12-27-76 Fld. deft. ANS. to interrogs. t/w affid. of serv.

1-6-77 Fld. stip. & ord. re cont. of pltff. mot. to certify class action & of deft's mot. re; reconsideration on 1-31-77 @ 10:30am. (GT)

1-20-77 Fld. notice of mot. & renewed mot. to intervene as pltffs memo of pts. & auths in support & affid. of serv. Ntc. for 1-31-77 @ 10:30am.
LODGED Amended complt. in intervention for declaratory relief. Fwrd. orig. + one to Judge GT.

1-25-77 Fld. pltff memorandum in opposition to deft's mot. for reconsideration t/w affid. of serv.
LODGED proposed ord. denying deft. mot. for S/J Fwrd. orig. + 2 to Judge. GT

DATE

1-31-77 Ent. ord. hrg. mots. cont. to 2-22-77 @ 10:30am. (GT)

2-2-77 Fld. stipulation & ord. re continuance of pending mot. to 2-22-77 @ 10:30am. (GT)

2-14-77 Fld. deft. supplemental memorandum in support of mot. for S/J
Fld. deft. brief in opposition to mot. to renew mot. to intervene
Fld. deft. brief in opposition to pltff mot. for class action
Fld. affid. of serv. of nos. 41 thru 43.

2-15-77 Fld. pltff supplemental memo in support of mot. for class action certificate t/w affid. of serv.

2-18-77 Fld. pltff. supplemental memo. in opposition to deft's mot. for reconsideration.

2-22-77 Ent. ord. hrg. pltff. mot. for class action cert.-mot. granted. Hrg. deft. mot. for court's reconsideration of oral comments-denied. Ct. will file an opinion hrg. pltfs renewed mot. to intervene as pltff on behalf of Anna Tolstick & Betsabe Rivas-denied. (GT)

2-28-77 Fld. deft. reply memorandum t/w affid. of serv.

3-16-77 Fld. pltff notice of mot. & mot. for order granting class relief, memo of pts. & auths in support & affid. of se rv. Nt. for 3-28-77 @ 10:30am.

3-24-77 Fld. pltff notice of mot. & mot. for clarification of class cert. memo in support of pltff mot. for clarification t/w affid. of serv.

3-28-77 Ent. ord. hrg. pltff mot. for order granting class relief-hrg. cont. to 4-4-77 @ 10:30am. (GT)

3-30-77 Fld. stipulation & order for cont. of mot. for class relief to 4-4-77 @ 10:30am. w/ ord. theron. (GT)

3-31-77 Fld. deft. response to pltff proposed order granting class relief. t/w affid. of serv.

DATE

4-4-77 Ent. ord. hrg. mots.—mot. for an order granting class relief & for clarification or class cert. cont. to 4-11-77 @ 10:30am. (GT)

4-5-77 Fld. pltff reply memorandum in support of mot. for class relief. t/w affid. of serv.

4-11-77 Ent. ord. hrg. pltff mot. for an order granting class relief granted. w/ modification. Hrg. pltff mot. for clarification of class cert. granted. Counsel for pltff submit proposed ord. (GT)

4-21-77 LODGED proposed ord. re class cert. Fwrd. orig. & one Judge Thompson.

8-12-77 Fld. opinion. Order to follow incorporating the conclusions contained in this opinion. (GT) (Ent. 8-12-77) Mld. cpys.

8-23-77 Fld. ord. granting mot. for class cerf., granting plfts mot. summy judgment & granting individual & class relief. Defts shall file a mot. informing all class members & serve a cpy on plfts w/in 30 days after entry of this ord. Objs to such ord shall be fld w/in 30 days of serv of prop ord. Defts to file an affed w/ct re srev of not. Further that this ct retain juris. of this cause until all relief has been effectuated. Further that the ct finds no reasons for delaying the enforcement of thes ord. (GT) (Ent 8-23-77)

8-31-77 Fld plft not of change of address of Atty. t/w affd of serv.

9-6-77 Fld judgment that the mot for class cert on behalf of the class as defined in the ord filed 8-23-77 is granted; Summary Judgment is granted to plfts; individual and class relief are granted pursuant to the provisions in the ord filled 8-23-77; and each party shall bear his or her own costs. (Ent 9-6-77) (GT) mld cys JS6

9-19-77 Fld change of address of atty PETER A. SCHEY TO Legal Aid Foundation of Los Angeles, 1550 West 8th Street, Los Angeles, Ca. 90017. t/w affd of serv.

DATE

9-22-77 Fld deft proposed notice to class t/w cert of serv.
Fld deft not of appeal t/w affd of serv.

10-4-77 Fld notice of cross-appeal from pltf frm judgmnt ent on 9-6-77.

10-17-77 Fld not of change of address of atty for plfts: VICTOR HARRIS, CALIFORNIA RURAL LEGAL ASSISTANCE, 115 Sansome Street, 9th Floor, San Francisco, Ca. 94104. (415) 421-3405. T/w affd fo serv.

10-26-77 Fld deft notice of mot & mot for partial stay of judgment set for hrg 11-14-77 @ 10:30am t/w defts memo in suppt & cert of serv.

10-25-77 Fld pltf objections to defts proposed class notice t/w declar of serv.

10-27-77 Fld deft submission of affid that was inadvertently not attached to memo, affid is of Audrey M. Hopkins t/w cert of serv.

11-14-77 Ent ord hrg defts mot for partial stay of jdgmt cont to 11-21-77 @ 10:30am. (GT)

11-21-77 Ent ord hrg defts mot for partial stay of jdgt, cnsl will file a stip cont the mot. (GT)

11-22-77 Fld stip cont defts mot for partial stay of jdgmt to 1-9-78 @ 10:30am

11-25-77 Fld notice of taking depos Audrey M. Hopkins & the officers, managing agents & employees of Social Security Admin. set for 12-2-77 @ 10am t/w declar of serv. Hrg taken at office of HEW cnsl J.Watson.

11-25-77 Fld pltf reqst for production of documents t/w declar of serv.
Fld defts response to pltfs objections to defts proposed class notice t/w cert of serv.

DATE

12-16-77 Fld Pltfs. appellee's Request to Clerk to Certify and Transmit Partial Record. (mld cys) NOTE: Per telephone conversation with Mr. Larsen at U.S. Supreme Court, Appeal is to be transmitted to U.S. Supreme Court as soon as possible.

12-22-77 Fld pltf notice of mot to mod ord w/ mot set 1-9-78 @ 10:30am t/w memo in suppt & declar of serv.

12-30-77 Fld Reporter's Trans. of Prcdgs. on 11-1-76 and 11-8-76, Original and one copy. (Jean Clarke, OCR).

1-3-78 Fld Notice of Withdrawal of Ian Fan as one of the attorneys for plaintiffs & approval thereon (GT) t/w Decl. of svc by mail.

1-5-78 Fld plt memo in Oppo to defts mot for partial stay of Cts order of 8-23-77 t/w declar of serv.

1-9-78 Ent ord hrg defts mot for partial stay of jdgmt & hrg pltfs mot to mod ord cont to 1-23-78 @ 10:30am (GT)

1-12-78 Fld stip cont defts mot for partial stay & pltfs mot to mod ord set 1-9-78 cont to 1-23-78 at 10:30am (GT)

1-16-78 Fld defts reply to pltfs memo in Oppo to defts mot for a partial stay of this Cts ord of 8-23-77 t/w affid of Audrey M. Hopkins & cert of serv.
Fld defts reply to pltfs mot to mod ord dated 8-23-77 t/w cert of serv.

1-18-78 Mld reptrs. trans. t/w Clerk's Record on Appeal to U.S. Supreme Ct.

1-19-78 Fld pltfs reply to defts response re class notice t/w declar of serv.

1-20-78 Fld depo of Audrey M. Hopkins & Robert Marder taken 12-2-77.

1-23-78 Ent ord hrg pltfs mot to mod ord—cnsl will attempt to stip, Hrg defts mot for partial stay of jdgmt Granted in part; Ct. will prepare ord. (GT)

DATE

2-7-78 Fld deft's filing of proposed order granting partial stay of judgmt t/w certif of serv by mail.
LODGED order & sent to Judge Thompson. (not going to be signed)

2-17-78 Fld plntf's obj to deft's proposed ord granting partial stay of judgmt t/w affid of serv.
LODGED plntf's proposed ord granting partial stay of judgmt & sent to Judge Thompson.

2-22-78 Fld pltf ord granting a partial stay of jdgmt til Supreme Ct. renders final decision in this action (GT)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Filed Nov. 25, 1975]

Civil Action No. 75-1103-GT

GRACE AZNAVORIAN, individually (and on behalf of all other aged, blind or disabled persons similarly situated); Centro de Accion Social Autonomo, an unincorporated association; C.A.S.A. JUSTICIA, National City, an unincorporated association, PLAINTIFFS

v.

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare, individually and in his official capacity, DEFENDANT

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND RELIEF IN THE NATURE OF MANDAMUS

I

INTRODUCTION

Plaintiffs in this action challenge the constitutionality of Section 1611(f) of the Social Security Act, 42 U.S.C. section 1382(f), which provides as follows:

> "Notwithstanding any other provision of this title, *no individual shall be considered an eligible individual for purposes of this title for any month during all of which such individual is outside the United States* . . .
>
> For purposes of the preceding sentence, *after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 days.*" 42 U.S.C. 1382(f) (Emphasis added).

Plaintiff GRACE AZNAVORIAN, a recipient of Supplemental Security Income benefits, was denied her benefits for the months of August and September, 1974, after being outside of the United States from July 21, 1974 to September 1, 1974, pursuant to 42 U.S.C. 1382(f). Plaintiff AZNAVORIAN pursued all administrative remedies prior to initiating this action.

Plaintiffs allege that the above-mentioned statute violates the Due Process clause of the Fifth Amendment to the United States Constitution and further denies Equal Protection in that it creates a class of recipients who are precluded from establishing eligibility merely because they exercised their fundamental right to travel. 42 U.S.C. 1382(f), plaintiffs argue, fails under strict scrutiny, to promote a compelling government interest.

Plaintiffs pray for the issuance of declaratory and injunctive relief, and an order in the nature of Mandamus

against Defendant, and sums due to which plaintiffs are entitled.

II

JURISDICTION

1. Jurisdiction is conferred on this Court by Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), which states in relevant part:

> "(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision . . . Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides . . ." 42 U.S.C. 405(g).

Plaintiff AZNAVORIAN resides in San Diego County, California, and appeared at a hearing before a Hearing Examiner on February 21, 1975. Plaintiff appealed the decision of the Hearing Examiner to the Appeals Council, Social Security Administration, Deartment of Health, Education and Welfare. Said appeal was denied on or about September 26, 1975. This action is therefore authorized by 42 U.S.C. 405(g).

2. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. sections 2201, 2202, and Rule 57, Federal Rules of Civil Procedures, as an actual controversy exists between the parties to this action as set forth herein.

3. Jurisdiction is further conferred on this Court by 28 U.S.C. section 1361, which gives to the district courts original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to a plaintiff.

III

THREE JUDGE COURT

4. 28 U.S.C. 2282 provides that an interlocutory or permanent injunction restraining the enforcement, operation or execution of "any Act of Congress for repugnance to the Constitution of the United States" shall not be granted by any district court or judge thereof unless the application therefor is "heard and determined by a district court of three judges" under 28 U.S.C. 2284.

Plaintiffs seek relief in the nature of declaratory relief, mandamus and injunctive relief against defendant, a federal officer, alleging that 42 U.S.C. 1382(f) is repugnant to the United States Constitution. This action is therefore a proper action to be heard by a three-judge panel pursuant to 28 U.S.C. 2282 and 28 U.S.C. 2284.

IV

PLAINTIFFS

5. Plaintiff GRACE AZNAVORIAN is a United States citizen residing in San Diego, California. Plaintiff AZNAVORIAN derives her income for food, shelter and the necessities of life, from Supplemental Security Income benefits (hereinafter, SSI), for which she has been determined to be eligible based on her disability. Plaintiff AZNAVORIAN left the United States on or about July 21, 1974, and returned to the United States on or about September 1, 1974. Plaintiff AZNAVORIAN travelled to Mexico for this period for health reasons and in order to obtain medical assistance. Plaintiff AZNAVORIAN has been denied her SSI benefits for the months of August and September, 1974, based on 42 U.S.C. 1382(f).

6. Plaintiff C.A.S.A. JUSTICIA, National City, also known as Centro de Accion Social Autonomo Justicia, (hereinafter, CASA), is an unincorporated association that has standing to initiate litigation on behalf of it's members, most of whom are Chicano and many of whom receive SSI benefits. Many of the members of CASA

have opportunity to depart from the United States for more than one month in order to visit relatives in Mexico or other foreign countries. Many members of CASA will have, and have had, their SSI payments terminated because of the action of defendant pursuant to 42 U.S.C. 1382(f).

7. Plaintiff Centro de Accion Social Autonomo Justicia, 2671 West Pico Boulevard, Los Angeles, California 90006, (hereinafter, LA-CASA), is an unincorporated association that has standing to initiate litigation on behalf of its members, most of whom are Chicano and many of whom receive SSI benefits. Many of the members of LA-CASA have opportunity to depart from the United States for more than one month in order to visit relatives in Mexico or other foreign countries. Many members of LA-CASA will have, and have had, their SSI payments terminated because of the action of defendant pursuant to 42 U.S.C. 1382(f).

V

DEFENDANT

8. Defendant F. David Mathews is the Secretary of the United States Department of Health, Education, and Welfare. Said defendant is used individually and in his official capacity as the official charged, under the Social Security Act, with primary responsibilities for the administration of the Social Security Administration, execution of its laws and promulgation of its regulations. 42 U.S.C. 405(a). In his official capacity, he is responsible for administering and inforcing 42 U.S.C. section 1382(f) and regulations promulgated thereunder, which provisions are challenged herein as being in conflict with the United States Constitution.

VI

CLASS ACTION ALLEGATIONS

9. Plaintiff AZNAVORIAN brings this action on behalf of herself and all others similarly situated under

Rule 23(a) and (b)(1) and (2) of the Federal Rules of Civil Procedure. The class represented consists of all persons, otherwise eligible for SSI, who have been denied SSI benefits solely pursuant to 42 U.S.C. 1382(f) and have exhausted their administrative hearings within sixty days prior to the filing of this action or at any time hereafter.

10. The size of the class is ascertainable from the records and files in the possession of defendant. The persons in the class are so numerous that joinder of all members is impracticable.

11. The questions of law and fact raised by plaintiffs are common to all members of the class, to wit: whether 42 U.S.C. 1382(f) violates Due Process and Equal Protection guaranteed by the Fifth Amendment to the United States Constitution in that it creates an irrebuttable presumption that persons who remain outside the United States for one month or more, cannot establish residence back in the United States for the first month during which they have physically returned to the United States, and further violates the fundamental right to travel. The claims of plaintiff AZNAVORIAN are typical of the claims of the class.

12. Defendant has acted similarly as to all members of the class as evidenced by the nationwide applicability of the subject statute.

13. Plaintiffs will fairly and adequately protect the interests of the class. There are no conflicts of interest between Plaintiffs and the members of the class. Plaintiffs are represented by attorneys employed by federally funded legal services programs with considerable experience in the area of public assistance litigation.

VII

FACTUAL ALLEGATIONS

14. On July 21, 1974, plaintiff AZNAVORIAN, Social Security Number 129-24-0891, an eligible recipient of Supplemental Security Income benefits, left the United

States for health reasons, proceeding to Guadalajara, Mexico, where she sought medical attention.

15. Plaintiff returned to the United States on September 1, 1974. On September 10, 1974, plaintiff had contact with the San Diego office of the Social Security Administration about her SSI benefits. Plaintiff was informed that she would not be eligible to receive SSI benefits for the month that she was outside the United States and for the first month that she resides back in the United States. Plaintiff, on September 10, 1974, submitted to the Social Security Administration a "Request for Reconsideration" form SSA-561, requesting reinstatement of SSI benefits.

16. On February 21, 1975, plaintiff appeared at an administrative hearing before Hearing Examiner Richard D. Eadie. A decision was rendered by the Hearing Examiner on March 31, 1975, finding that the undisputed evidence indicated that plaintiff was outside of the United States for a few days in excess of one month. The Hearing Examiner further found that plaintiff was therefore ineligible for SSI benefits for the months of August and September, 1974, pursuant to Social Security Act section 1611(f), 42 U.S.C. 1382(f).

17. Within 60 days thereafter, plaintiff filed a "Request for Review of Hearing Examiners Action" form HA-520a, with the Appeals Council. A written brief in support of the appeal was also submitted to the Appeals Council, raising the same constitutional challenges raised herein. The Appeals Council rejected the appeal on September 26, 1975, and plaintiff received said notification on October 2, 1975. This action followed.

VIII

CLAIMS FOR RELIEF
FIRST CAUSE OF ACTION

18. The provisions of 42 U.S.C. 1382(f) creates a category of persons who are ineligible to receive SSI benefits. This category of persons is initially defined as

those individuals who remain outside the United States for one month or more.

19. This arbitrary classification penalizes plaintiff for exercising her fundamental right to travel outside of the United States protected by the Fifth Amendment to the United States Constitution. Any statutory scheme affecting plaintiff's Fifth Amendment right to travel must withstand a "strict scrutiny" standard of review and must justify a "compelling" government interest.

20. 42 U.S.C. 1382(f) creates two classes of needy persons, indistinguishable from each other except that one has remained in the United States, while the other has been outside the United States for one month. On this sole basis, the first class is granted, and the second class denied, SSI benefits upon which plaintiff depends for food, clothing, medical care, and the other necessities of life.

21. No adequate governmental justification exists for this arbitrary scheme which discriminates against recipients of SSI who remain outside of the United States for one month.

IX

SECOND CAUSE OF ACTION

22. 42 U.S.C. 1382(f) further provides that a person who has remained outside the United States for one month or more, is held to remain outside the United States, for eligibility purposes, for the first month that the person is physically back in the United States. That is, the person does not qualify for SSI benefits until the person has been back in the United States for one full month.

23. The statutory scheme imposes a 30 day *durational residency* requirement on individuals otherwise qualified for SSI benefits who are returning to the United States from a trip of one month or more outside of the United States.

24. This portion of the statute penalizes SSI recipients for exercising their Fifth Amendment right to travel outside of the United States.

25. This portion of the statute creates two classes of needy people, indistinguishable from one another except that one group has remained in the United States and the other has returned to the United States and has not yet remained in the United States for 30 consecutive days following their return.

26. By virtue of this arbitrary and capricious provision, plaintiff was denied for the first 30 days after returning to the United States the aid upon which she depended for food, clothing, medical care and other necessities of life.

27. No adequate compelling government justification exists for this arbitrary scheme which discriminates against individuals who are otherwise eligible for SSI benefits, including plaintiffs. It is therefore invalid as a violation of plaintiff's right of Due Process and Equal Protection as provided in the Fifth Amendment of the United States Constitution.

X

THIRD CAUSE OF ACTION

28. The provisions of 42 U.S.C. 1382(f), and the regulations promulgated thereunder, denies Plaintiffs the opportunity to prove the salient facts regarding their residence for purposes of SSI eligibility, and imposes a conclusive presumption of non-residency for the first 30 days that the person is back in the United States.

29. The statutory scheme therefore denies Plaintiff's right to Due Process and Equal Protection under the Fifth Amendment.

XI

DECLARATORY RELIEF

30. An actual controversy exists between Plaintiffs and Defendant in that Plaintiffs contend that 42 U.S.C. 1382(f) violates their rights to Due Process and Equal Protection under the Fifth Amendment for reasons cited above. An order from this Court is required to resolve this controversy.

XII

INJUNCTIVE RELIEF

31. Defendant is now, and unless restrained by the Court, will continue to apply 42 U.S.C. 1382(f) to deny SSI benefits in whole or in part to persons otherwise eligible therefor.

32. Unless Defendant is restrained from further application of 42 U.S.C. 1382(f), Plaintiffs and the class of persons whom they represent will suffer immediate and irreparable injury in that they will be wrongfully denied the SSI benefits to which they are entitled, thereby depriving them of the means to obtain the basic necessities of life.

33. Plaintiffs and the class of persons whom they represent have no adequate remedy at law. The damage to them caused by Defendant is beyond pecuniary valuation and compensation.

XIII

MANDAMUS

34. Defendant is under a mandatory duty, imposed by the Fifth Amendment of the United States Constitution, to pay SSI benefits to all persons eligible therefor.

35. Defendant has announced his intention not to recompense Plaintiffs and the members of their class for the period of time during which they were outside of the United States for one month or more and for the first 30 days in which they are back in the United States as the result of the application of 42 U.S.C. 1382(f).

36. By refusing to pay the Plaintiffs and their class the benefits to which they would have been entitled, but for 42 U.S.C. 1382(f), Defendant fails to perform the duties enjoined upon him by the Fifth Amendment of the United States Constitution.

37. Plaintiffs and the class they represent have no adequate remedy available at law other than this suit to enforce the duty owed them by Defendant.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray that this Court:

1. Assume jurisdiction of this case;
2. Convene a three-judge court, pursuant to 28 U.S.C. sections 2282 and 2284, and set this case promptly for a hearing and determination of this controversy;
3. Certify this action as a class action pursuant to Rule 23, Federal Rules of Civil Procedure;
4. Issue preliminary and permanent injunction, and a writ in the nature of mandamus, enjoining Defendant, his agents, employees, and all persons acting in concert with him from enforcing the provisions of 42 U.S.C. 1382(f) and from treating SSI recipients and applicants as being outside of the United States for the first 30 days they spend in the United States after returning from a trip of one month or more outside the United States.
5. Enter a final judgment declaring that 42 U.S.C. 1382(f) is void and invalid as being violative of due process and equal protection rights guaranteed by the Fifth Amendment to the United States Constitution;
6. Enter a final judgment ordering Defendant to pay to each Plaintiff and each class member the sum of benefits which would have been paid but for the operation of 42 U.S.C. 1382(f).
7. Award to Plaintiffs reasonable attorneys' fees to be paid directly to their attorneys and their costs of suit and disbursements.

8. Award such further relief as the Court deems just and proper.

DATED: November 25, 1975

Respectfully submitted,

/s/ Peter A. Schey
PETER A. SCHEY
ROBERT BURKHOLDER
VICTOR HARRIS
DOROTHY LANG
RALPH S. ABASCAL
Attorneys for Plaintiffs

VERIFICATION

I, PETER A. SCHEY, declare:

I am an attorney at law duly admitted and licensed to practice before this Court and am one of the attorneys for the plaintiffs in the matter herein.

I have read the foregoing complaint and know the contents thereof.

The same is true of my knowledge, except as to those matters which are therein stated on information and belief, and as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

I make this verification because the facts set forth in said complaint are within my knowledge and because as attorney for the plaintiffs herein, I am more familiar with such facts than are the parties.

Executed this 24th day of November, 1975, in the City of San Diego, County of San Diego, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Peter A. Schey
PETER A. SCHEY
Attorney for Plaintiffs

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Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 75-1103-GT

[Filed Feb. 20, 1976]

GRACE AZNAVORIAN, etc., et al., PLAINTIFFS

v.

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare, etc., DEFENDANT

ANSWER

COMES NOW the defendant, F. David Mathews, by and through his attorneys, Terry J. Knoepp, United States Attorney, and William A. Shaw, Assistant U.S. Attorney, and in answer to plaintiffs' complaint, states as follows:

1. Defendant admits the allegations of paragraph 1 of plaintiffs' complaint, except that defendant states that jurisdiction is authorized by section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) which is made applicable to SSI (Title XVI) cases by section 1631(c)(3) of the Social Security Act, 42 U.S.C. § 1383(c)(3).

2. With respect to paragraph 2, defendant denies that jurisdiction is conferred on the court by 28 U.S.C. § 2201 and § 2202, and Rule 57 of the Federal Rules of Civil Procedure.

3. With respect to paragraph 3, defendant denies that jurisdiction is conferred on the court by 28 U.S.C. § 1361.

4. With respect to paragraph 4, defendant denies that this is a proper action to be heard by a three-judge panel pursuant to 28 U.S.C. §§ 2282 and 2284.

5. Defendant admits paragraph 5, except that defendant neither admits nor denies the alleged reason for plaintiffs' trip to Mexico.

6. With respect to paragraphs 6 and 7, defendant is without knowledge or information sufficient to form a belief as to the allegations therein.

7. Defendant admits paragraph 8.

8. With respect to paragraphs 9, 10, 11, 12, and 13, defendant denies that this is a proper case for class certification.

9. Defendant admits paragraphs 14, 15, 16, and 17, except that defendant neither admits nor denies the alleged reason for plaintiffs' stay in Mexico.

10. Defendant admits paragraph 18.

11. With respect to paragraphs 19, 20, and 21, defendant denies that the statutory classification is arbitrary or that it penalizes plaintiff in the exercise of any Constitutional right. Defendant states that adequate justification for the scheme exists when tested against the proper standard of review.

12. Defendant admits paragraph 22.

13. With respect to paragraphs 23, 24, 25, 26, and 27, defendant denies that the statutory scheme operates to unconstitutionally penalize SSI recipients for the exercise of Fifth Amendment rights. Defendant states that the challenged provision is neither arbitrary nor capricious, and that adequate governmental justification exists when tested against the proper standard of review.

14. With respect to paragraphs 28, and 29, the defendant denies that the challenged statute imposes a conclusive presumption in violation of plaintiffs' Fifth Amendment rights.

15. With respect to paragraph 30, defendant denies plaintiffs' right to declaratory relief. Defendant states that 42 U.S.C. § 1382(f) in no way violates plaintiffs' rights to due process and equal protection.

16. Defendant admits paragraph 31.

17. With respect to paragraph 32, defendant denies that further application of 42 U.S.C. § 1382(f) will cause immediate and irreparable injury or wrongfully deny benefits to anyone. Therefore, defendant states that injunctive relief would be improper.

18. Defendant denies the allegations in paragraph 33.

19. Defendant admits paragraphs 34 and 35.

20. Defendant denies paragraphs 36 and 37, and states that plaintiff has no right to a remedy in the nature of mandamus.

In accordance with the provisions of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), defendant files herein as part of his answer a certified copy of the transcript of the record, including the evidence upon which findings and decisions complained of are based.

WHEREFORE, defendant prays for judgment dismissing the complaint with costs and disbursements, and for judgment in accordance with section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), as made applicable herein by section 1631(c)(3) of the Social Security Act, 42 U.S.C. § 1383(c)(3), affirming the decision complained of.

DATED: February 20, 1976

TERRY J. KNOEPP
United States Attorney

/s/ William A. Shaw
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Assistant U.S. Attorney

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Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 75-1103-GT

[Filed Apr. 29, 1976]

GRACE AZNAVORIAN, etc., et al., PLAINTIFFS

v.

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare, etc., DEFENDANT

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS CENTRO DE ACCION SOCIAL AUTONOMO AND CASA JUSTICIA, NATIONAL CITY COMPLAINT AND FOR SUMMARY JUDGMENT

COMES NOW the defendant, D[illegible] F. David Mathews, by and through his attorneys, Terry J. Knoepp, United States Attorney, for the Southern District of California, and D. Michael Waltz, Assistant U.S. Attorney, and respectfully moves the Court to dismiss the complaint herein, or in the alternative, grant the defendant summary judgment. A brief in support of this motion is herewith submitted.

DATED: April 27, 1976

TERRY J. KNOEPP
United States Attorney

/s/ D. Michael Waltz
D. MICHAEL WALTZ
Assistant U.S. Attorney

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75-1103-GT

[Filed May 13, 1976]

GRACE AZNAVORIAN, et al., PLAINTIFFS

vs.

F. DAVID MATHEWS, Secretary of Health, Education and Welfare, individually and in his official capacity,
DEFENDANTS

PLAINTIFFS' FIRST SET OF INTERROGATORIES

TO: Terry J. Knoepp, U.S. Attorney
D. Michael Waltz, Asst. U.S. Attorney
United States Courthouse
325 West F Street, Annex A
San Diego, California 92101

Plaintiffs request that defendant, or his authorized agent, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure and Rule 6(b) of the Rules of Civil Procedure of the United States District Court for the Southern District of California, the following interrogatories:

1. Please state the total number of Supplemental Security Income recipients whose monthly benefits were suspended, interrupted or denied pursuant to 42 U.S.C. § 1382(f), during each of the following time periods:

(a) Calendar year 1974;

(b) Calendar year 1975; and

(c) January 1976 through April 1976.

2. Please state the total number of Supplemental Security Income recipients whose monthly benefits were suspended, interrupted or denied pursuant to 42 U.S.C. § 1382(f) since 1974, and whose suspension, interruption or denial was affirmed after a *Request for Reconsideration* during each of the following time periods:

(a) September 26, 1975 through November 25, 1975;

(b) November 26, 1975 through May 10, 1976.

3. Please state the total number of Supplemental Security Income recipients whose monthly benefits were suspended, interrupted or denied pursuant to 42 U.S.C. § 1382(f) since 1974, and whose suspension, interruption or denial was affirmed after a hearing before a Hearing Examiner during each of the following time periods:

(a) September 26, 1975 through November 25, 1975;

(b) November 26, 1975 through May 10, 1976.

4. Please state the total number of Supplemental Security Income recipients whose monthly benefits were suspended, interrupted or denied pursuant to 42 U.S.C. § 1382(f) since 1974, and whose suspension, interruption or denial was affirmed after a *Request For Hearing* determined without oral proceedings during each of the following time periods:

(a) September 26, 1975 through November 25, 1975;

(b) November 26, 1975 through May 10, 1976.

5. Please state the total number of Supplemental Security Income recipients whose monthly benefits were suspended, interrupted or denied pursuant to 42 U.S.C. § 1382(f) since 1974, and whose suspension, interruption or denial was affirmed upon a *Request For Review* by the Social Security Administration's Appeals Council during each of the following time periods:

(a) September 26, 1975 through November 25, 1975;

(b) November 26, 1975 through May 10, 1976.

6. For *each* of the totals you provided in answering interrogatories 1 through 5, please list the number of such recipients who received their Supplemental Security Income benefits in California immediately prior or subsequent to suspension, interruption or denial pursuant to 42 U.S.C. § 1382(f).

7. Please identify the sources and records upon which you base your answers to interrogatories 1 through 6.

7(a) Please state the names, official positions, and last known business addresses of each custodian of such records.

8. Please state the full names, business addresses, and official positions of each person who participated in providing the answers to these interrogatories.

9. Please state the full name, present business address, and official position or relation to defendant Mathews of the person signing or verifying the answers to these interrogatories.

Please take notice that a copy of such answers must be served upon the counsel for plaintiffs within 30 days after the service of these interrogatories.

DATED: May 10, 1976

By /s/ Victor Harris
VICTOR HARRIS
Attorney for Plaintiffs

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Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75-1103-GT

[Filed Nov. 3, 1976]

GRACE AZNAVORIAN, et al., PLAINTIFFS

vs.

F. DAVID MATHEWS, etc., DEFENDANT

STIPULATED WITHDRAWAL APPLICATION FOR CONVENING OF THREE-JUDGE COURT

Comes now plaintiff Grace Aznavorian, and intervenors Anna Tolstick and Betsabe Rivas, individually and on behalf of all other persons similarly situated, and withdraw without prejudice the Application for Convening of a Three-Judge Court filed herein. The basis for said withdrawal of application is that plaintiffs and intervenors hereby abandon, without prejudice, all requests heretofore entered to enjoin defendant from enforcing 42 U.S.C. § 1382(f) and any jurisdictional assertion under 28 U.S.C. § 1361 contained in the Complaint and Complaint for Intervention. Plaintiffs and intervenors expressly retain all class action, declaratory and other claims for relief concerning the unconstitutionality of 42 U.S.C. 1382(f), under 42 U.S.C. §§ 1383(c)(3) and 405(g).

Plaintiffs and defendant stipulate herein to a withdrawal of plaintiffs allegations and claims as stated above.

DATED: NOVEMBER 5, 1976

/s/ Peter A. Schey
PETER A. SCHEY
One of the attorneys for Plaintiffs

/s/ D. Michael Waltz
D. MICHAEL WALTZ
Assistant U.S. Attorney
Attorney for Defendant

IT IS SO ORDERED.
DATED 11-8-76

/s/ Gordon Thompson, Jr.
United States District Judge

TERRY J. KNOEPP
United States Attorney
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 75-1103-GT

[Filed Nov. 19, 1976]

GRACE AZNAVORIAN, et al., PLAINTIFFS

v.

F. DAVID MATHEWS, Secretary of Health, Education and Welfare, DEFENDANT

DEFENDANT'S OBJECTIONS TO ANSWERING PLAINTIFF'S INTERROGATORIES

Defendant objects to answering plaintiff's questions numbered 1, 2, 3, 4, 5, and 6 of Plaintiff's First Set of Interrogatories filed herein on May 13, 1976, on the grounds that the administrative burden entailed would be unreasonably oppressive and expensive. No records are maintained by defendant which would enable it to answer the questions propounded.

This Court has the authority to protect a party from answering interrogatories if it would prove unduly burdensome and oppressive. *E.g. Boroman* v. *General Motors Corp.*, 64 F.R.D 62 (E.D. Pa. 1974), *Acktiebolagt Vargos* v. *Clark*, 8 F.R.D. 635 (D. D.C. 1949).

> Clearly an interrogated party must furnish relevant information which can be obtained without great

> labor expense. It is equally clear to me that, desirable as discovery process may be, it should not place upon a defendant the burden of many thousand man hours of labor and the expense of many thousands of dollars.

Tivoli Realty v. *Paramount Pictures*, 10 F.R.D. 201, 203 (D. Del. 1950).

It is just such an enormous expenditure of labor and money, in this case tax dollars, which answering the plaintiff's interrogatories would require. Due to the structure and organization of the Social Security Records, a folder-by-folder review would be required to answer plaintiff's interrogatories. The minimum estimated cost for this procedure to take even a valid sampling of the records would be in excess of $1,000,000, for the substantial sample which would be required. If overtime is required, the cost would exceed $1,500,000. The use of existing District Office personnel in such a time consuming undertaking could also cause labor relations and morale problems and would certainly detract from the performance of their essential functions. (See affidavit of Barry Powell, Acting Deputy Assistant Bureau Director of Policy, Standards, and Systems, attached hereto as Exhibit "A.")

It is submitted that this court should weigh the labor and expense involved in compiling the data requested against the value of the information sought to be obtained. *See, e.g., V. D. Anderson Co.* v. *Helena Cotton Oil Co.*, 117 F.Supp. 932 (D. Ark. 1954). In this case the answers to the questions do not go to jurisdiction or to the merits. Instead, they are directed at the establishment of a class. The tremendous outlay of thousands of manhours and hundreds of thousands of dollars which would be required is simply not justified.

Accommodation can be made by the court between answering none of the interrogatories and answering all of them in full. *E.g., Caldwell-Clements* v. *McGraw Hill Pub. Co.*, 12 F.R.D. 531 (S.D. N.Y. 1952). Defendant herein offers as such an accommodation the only relevant figures readily obtainable from Social Security Records:

The total number of SSI recipients whose cases were in NO 3 status (nonpay status due to suspension or denial) pursuant to 42 U.S.C. § 1382(f) was, as of April 30, 1976, 7,426. (See affidavit of Barry Powell, attached as Exhibit "A.") This total is not a cumulative count as none is available. It is subject to change as records pass from pay status to NO 3 pay status depending upon current residence status.

Conclusion

For the reasons stated above, defendant objects to answering plaintiff's interrogatories.

DATED: November 19, 1976

TERRY J. KNOEPP
United States Attorney

/s/ D. Michael Waltz
D. MICHAEL WALTZ
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75-1103-GT

GRACE AZNAVORIAN, individually (and on behalf of all other aged, blind or disabled persons similarly situated); Centre de Accion Social Autonomo, an unincorporated association; C.A.S.A. JUSTICIA, National City, an unincorporated association, PLAINTIFFS

vs.

DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, individually and in his official capacity, DEFENDANT

AFFIDAVIT OF BARRY POWELL

I, Barry Powell, being first duly sworn, deposes and says as follows:

I am Acting Deputy Assistant Bureau Director for Operating Policies, Standards and Systems (Policy) of the Bureau of Supplemental Security Income (SSI), Social Security Administration, Department of Health, Education and Welfare. I have authorized employees under my supervision to determine the availability of the information requested by Plaintiff in this case and the administrative burden and cost involved in collecting it. I have been advised as follows:

As of April 30, 1976, the total number of SSI cases in NO 3 Payment Status (nonpayment as the result of suspension or denial) pursuant to 42 U.S.C. § 1382(f) was 7,426. This is not a cumulative count of denials and suspensions. This total is a count of records in this pay status as of the date shown only. A record can pass from pay status to NO 3 Payment Status to pay status depending upon the recipient's residence. Originally denied claims are deleted in the Social Security Records (SSR) process when the original decision is later re-

versed. Also, cases originally awarded but subsequently placed in NO 3 Payment Status are included in the total.

Due to the structure of the SSR no records of affirmations of suspensions, and/or denials are readily available at either the reconsideration or appeals levels. Such information could be accumulated only through a folder-by-folder review. The following estimates are for an SSA study to ascertain the number of SSI recipients whose benefits were suspended, interrupted or denied pursuant to 42 U.S.C. § 1382(f); those who requested a reconsideration of the suspension, interruption or denial; those who requested a hearing; and those who requested a review by the Appeals Council.

The Division of Appraisal, OPO, estimates that because of the small number of cases involved, a substantial sample (about 15 percent) of the 4,329,352 SSI recipents would be required—approximately 665,000 cases to ensure a reliable national sample. A folder review of each of these 665,000 cases would require about 10 minutes staff time in the DO or RSI Program Service Center. The positions involved in the DO would be Service Reps, Data Review Technicians, and Claims Development Clerks, representing on average grade level of a GS-7 ($12,600 annual salary).

Considerable overtime would probably be required for this project. The personnel available are the same District Office employees who must work with the continuing problems of claimants and beneficiaries. These offices are usually quite busy helping people with their social security, SSI, and Medicare problems. To take employees who are doing such essential work and put them to work on a study such as this would result in a decline in the quality of service in the offices involved. Thus, overtime would probably have to be resorted to in most offices. In addition to the higher cost of overtime, there is also the problem of pressing employees to work overtime which could result in labor relations or union problems.

The estimated total manpower and cost which would be involved are as follows:

Staffing—About 84 manyears

84 persons	Full time	1 year
168 persons	Full time	6 months
1,008 persons	Full time	1 month

Administrative Costs (salaries)

Regular Time	—	$1,058,400.00
or		
Overtime	—	$1,587,600.00

/s/ Barry Powell
BARRY POWELL
Acting Deputy Assistant
Bureau Director for
Operating Policies,
Standards, and Systems
(Policy)
Bureau of Supplemental
Security Income

Subscribed and sworn to before me this 12th day of November, 1976.

/s/ Patricia B. Pyles
Notary Public

My Commission expires on July 1, 1978.

TERRY J. KNOEPP
United States Attorney
D. MICHAEL WALTZ
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 75-1103-GT

[Filed Dec. 27, 1976]

GRACE AZNAVORIAN, et al., PLAINTIFFS

v.

F. DAVID MATHEWS, etc., DEFENDANT

ANSWERS TO INTERROGATORIES

TO: THE PLAINTIFF AND HER ATTORNEY OF RECORD, VICTOR HARRIS:

Pursuant to Federal Rules of Civil Procedure 33, the defendant answers the plaintiff's interrogatories.

INTERROGATORY 10

Please state how many of the 7,426 cases identified above are of individuals who have in fact permanently emigrated from the United States.

ANSWER 10

The answer to this question is not available. The information requested is not maintained by the Social Security Administration. See Affidavit of Barry Powell, attached hereto as Exhibit "A" and incorporated herein by this reference.

INTERROGATORY 11

Please state the number of months a case remains in 'NO 3 Payment Status pursuant to 42 U.S.C. § 1382(f)' if the original nonpayment decision is not appealed.

ANSWER 11

Section 1611(f) of the Act states: "Notwithstanding any other provision of this title, no individaul shall be considered an eligible individual for purposes of this title for any month during all of which such individual is outside the United States . . . . For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he had been in the United States for a period of 30 consecutive days."

Thus, when an individual is outside the United States for a full month (or at least 30 consecutive days) he is placed in NO 3 payment status.

The Regulations, 20 C.F.R. (416.1335), state: "Eligibility for benefits is terminated when 12 calendar months have elapsed after suspension for ineligibility if the beneficiary has not reestablished eligibility."

Thus, an individual would remain in NO 3 payment status until: (1), he has been in the United States for 30 consecutive days, at which time payments would resume if he were not otherwise ineligible; or (2), he has been in suspense status (NO 3) for 12 calendar months, at which time he would be terminated.

INTERROGATORY 12

Please state the approximate number of months an individual's case remains in 'NO 3 Payment Status pursuant to 42 U.S.C. § 1382(f)' if the individual stays outside the country for more than 90 days.

ANSWER 12

See answer to Interrogatory No. 11, *supra.*

INTERROGATORY 13

Please state the total number of SSI cases in 'NO 3 Payment Status pursuant to 42 U.S.C. § 1382(f)' as of the last day of each month from September, 1975 through October, 1976. If such totals are not available for each of said dates, please provide such totals for the dates closest thereto and state those dates.

ANSWER 13

No counts are available prior to February 1976.

February 76	6,779
March	7,102
April	7,425
May	7,898
June	8,304
July	8,745
August	9,195
September	4,951*
October	4,823*

* Inactive records which had received no payments during a 12 month period were purged from the Supplemental Security Record.

INTERROGATORIES 14 and 14(a)

Please identify the sources and records upon which you base your answers to interrogatories 10 through 13.

Please state the names, official prositions [sic], and last known business addresses of each custodian of such records.

ANSWERS 14 and 14(a).

Mr. Barry Powell, Acting Deputy Assistant Bureau Director for Operating Policies, Standards and Systems

(Policy) of the Bureau of Supplemental Security Income (SSI), Social Security Administration, Department of Health, Education and Welfare, Rockville, Maryland, and the records are maintained in Mr. Powell's custody.

INTERROGATORY 15

Please state the full names, business addresses, and official positions of each person who participated in providing the answers to these interrogatories.

ANSWER 15

See answer to Interrogatory No. 14, *supra.*

INTERROGATORY 16

Please state the full name, present business address, and official position or relation to defendant Mathews of the person signing or verifying the answers to these interrogatories.

ANSWER 16

The answers to interrogatories are signed by the Assistant United States Attorney, attorney for defendant.

Dated: December 22, 1976

TERRY J. KNOEPP
United States Attorney

/s/ D. Michael Waltz
D. MICHAEL WALTZ
Assistant U.S. Attorney

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 73-1103-GT

GRACE AZNAVORIAN, et al., PLAINTIFFS

v.

F. DAVID MATHEWS, Secretary of Health, Education and Welfare, DEFENDANT

AFFIDAVIT OF BARRY POWELL

I, Barry Powell, being first duly sworn, depose and say as follows:

I am Acting Deputy Assistant Bureau Director for Operating Policies, Standards and Systems (Policy) of the Bureau of Supplemental Security Income (SSI), Social Security Administration, Department of Health, Education and Welfare. I have authorized employees under my supervision to ascertain the information requested by Plaintiff in this case. I have been advised as follows:

10. The answer to this question is not available. The information requested is not maintained by the Social Security Administration.

11 and 12. Section 1611(f) of the Act states: "Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for purposes of this title for any month during all of which such individual is outside the United States . . . . For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he had been in the United States for a period of 30 consecutive days."

Thus, when an individual is outside the United States for a full month (or at least 30 consecutive days) he is placed in NO 3 payment status.

The Regulations, 20 C.F.R. (416.1335), state: "Eligibility for benefits is terminated when 12 calendar months have elapsed after suspension for ineligibility if the beneficiary has not reestablished eligibility."

Thus, an individual would remain in NO 3 payment status until: (1), he has been in the United States for 30 consecutive days, at which time payments would resume if he were not otherwise ineligible; or (2), he has been in suspense status (NO 3) for 12 calendar months, at which time he would be terminated.

13. No counts are available prior to February 1976.

February 76	6,779
March	7,102
April	7,425
May	7,898
June	8,304
July	8,745
August	9,195
September	4,951*
October	4,823*

* Inactive records which had received no payments during a 12 month period were purged from the Supplemental Security Record.

14 and 14(a). These questions have been answered in the introductory paragraph.

/s/ Barry Powell
BARRY POWELL
Acting Deputy Assistant
Bureau Director for
Operating Policies,
Standards, and Systems
(Policy)
Bureau of Supplemental
Security Income

Subscribed and sworn to before me this 16th day of December, 1976.

/s/ Patricia B. Pyles
Notary Public

My Commission expires on July 1, 1978.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 75-1103-GT

[Filed Feb. 7, 1978]

GRACE AZNAVORIAN, et al., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., etc., DEFENDANT

FILING OF PROPOSED ORDER GRANTING PARTIAL STAY OF JUDGMENT

On January 23, 1978, the court in the above-captioned action heard oral argument regarding Defendant's Motion For a Partial Stay of Judgment. After argument, the court indicated that it would grant a partial stay of the Judgment and stated that the court would draw up and issue the stay Order. Subsequent to the court proceedings, counsel for plaintiffs and defendant met with the law clerk for Judge Thompson and it was suggested by the law clerk that counsel for defendant prepare and file a proposed stay Order to assist the court in the preparation of the final Order. Defendant hereby

tenders his proposed stay Order by filing same with the court and serving counsel for plaintiffs with copies.

Respectfully submitted,

MICHAEL H. WALSH
United States Attorney

/s/ D. Michael Waltz
D. MICHAEL WALTZ
Assistant United States Attorney

OF COUNSEL:

Randolph W. Gaines
Chief of Litigation

John B. Watson
Attorney
Social Security Division
Office of the General Counsel
Department of Health, Education
and Welfare

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 75-1103-GT

GRACE AZNAVORIAN, et al., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., etc., DEFENDANT

ORDER

Upon consideration of Defendant's Motion For Partial Stay of Judgment, plaintiffs' opposition thereto, and after oral argument by counsel for the parties,

IT IS HEREBY ORDERED THAT:

1. Paragraph 3 of the Judgment of this court entered September 6, 1977, which grants individual and class relief pursuant to the provisions of this court's Order filed on August 23, 1977, is hereby stayed to the following extent:

(a) That portion of paragraph 6 of this court's Order which requires defendant to mail within 30 days of approval by the court class relief notices to all persons who received SSI benefits at any time from September 26, 1975, to August 23, 1977, is stayed until 30 days after the Supreme Court renders a final decision in this action.

(b) Paragraph 8 of this court's Order which requires defendant to file an affidavit with the court, and serve a copy on plaintiffs' counsel, attesting to timely mailing of the class relief notices is stayed until the Supreme Court renders a final decision in this action.

(c) Paragraphs 5, 6(c), (d) and (e), and 7 of the court's Order which require defendant to render redeterminations regarding the denials, interruptions, suspensions and terminations of the SSI benefits of certain class members and require defendant also to pay to such class members the benefits originally withheld should

they demonstrate United States residency during the disqualification period are stayed until the Supreme Court renders a final decision in this action.

2. To the extent that defendant feels that the Judgment of the court in this action may have a prospective effect on non-class members, the court stays any such prospective relief until the Supreme Court renders a final decision in this action.

3. With respect to paragraph 4 of the court's Order which reverses and declares null and void the denials, suspensions, interruptions and terminations of SSI benefits based on 42 U.S.C. 1382(f) for certain class members, defendant shall implement the process to identify such class members as set out in paragraphs 1 and 2 of the second Affidavit of Audrey M. Hopkins dated January 13, 1978. Defendant is required to prepare in its entirety a computer program that can be utilized to select all NO 3 designated individuals for which the computer records are reliable. The computer program will be coded, adequately tested and debugged and will be available for the selection of NO3 files no later than the date on which the Supreme Court renders a final decision in this action.

Dated:

GORDON THOMPSON, JR.
Judge
United States District Court

Copies to:

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San Francisco, Cal. 94104

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305 Center Street
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Peter Schey, Esq.
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1550 West Eighth Street
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Michael Waltz, Esq.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 75-1103-GT

GRACE AZNAVORIAN, et al., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., etc., DEFENDANT

CERTIFICATE OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED that:

I, Joyce A. Milhouse, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 940 Front Street, San Diego, California; I am not a party to the above-entitled action; and

On February 7, 1978, I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Filing of Proposed Order Granting Partial Stay of Judgment addressed to See attached list the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of February, 1978.

/s/ Joyce A. Milhouse

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75-1103-GT

[Received Feb. 21, 1978]

GRACE AZNAVORIAN, et al., PLAINTIFFS

vs.

JOSEPH A. CALIFANO, JR., etc., DEFENDANT

PLAINTIFFS' OBJECTIONS TO DEFENDANT'S PROPOSED "ORDER" GRANTING A PARTIAL STAY OF JUDGMENT

This Court only stayed those portions of its final Order of August 23, 1977 ("Order") which required defendant to mail notices to certain class members and to take the steps subsequent thereto in redetermining their eligibility for Supplemental Security Income ("SSI") benefits. These stayed portions of its Order are contained exclusively in paragraphs 5, 6 at lines 30-32, 7 and 8. Beginning with the obvious premise that only that needs to be stayed which has been ordered, plaintiffs make the following objections to defendant's proposed Order lodged on February 7, 1978 ("proposal"), and submit the attached "Proposed Order Granting Partial Stay Of Judgment" ("Pf. Proposed Order"), which avoids their objections:

1. Sub-paragraphs 1(a), (b) and (c) of defendant's proposal unnecessarily paraphrase the stayed paragraphs of the final Order. It avoids any confusion simply to refer to the stayed paragraph by number. [*See* Pf. Proposed Order ¶ 1.a.] Where only part of a paragraph of the final Order is stayed, it avoids confusion simply to quote it. [*See* Pf. Proposed Order ¶ 1.b.]

2. Sub-paragraph 1(c) of defendant's proposal also improperly includes sub-paragraphs 6(c), (d) and (e) of the final Order. Those sub-paragraphs specify the *contents* of the class relief notice, whose preparation has not been stayed. Apparently, defendant inserted them in his proposal because he mistakenly believed they required him to begin to conduct redeterminations of eligibility and the following appeal procedure, which in fact are required only by paragraph 5 of the Order. Granting a stay as to paragraph 5 of the Order accomplishes that purpose.

3. Paragraph 2 of defendant's proposal is totally unnecessary. The Secretary asks the Court to stay any "prospective relief" "[t]o the extent that *defendant feels* that the Judgment of the court in this action may have a prospective effect on non-class members. . ." (Emphasis added.) Apparently, he believes that the court permanently enjoined him from applying 42 U.S.C. § 1382(f) to non-class members [*See* Def. Mem. Supp. Stay at 6-7; Def. Reply Mem. Supp. Stay at 7-8] and to prepare and

publish new regulations and Claims Manual sections. [Def. Reply Mem. Supp. Stay, Hopkins Affidavit ¶ 4.]

Whatever defendant "feels" he has to do is irrelevant to what the Court specifically required him to do. Not one word in the Court's Opinion, Order or Judgment grants the injunctive relief the Secretary now wants this Court to stay. The Court expressly limited all relief to class members, and specifically defined that relief in its Order.

This Court did not have jurisdiction to grant prospective relief to non-class members for two reasons. First, 42 U.S.C. § 405(g) authorized the Court to grant relief only to class members before the Court, which it did. *See Jimenez* v. *Weinberger*, 523 F.2d 689, 694 (7th Cir. 1975). Second, 28 U.S.C. § 2282 prohibits a single judge from enjoining the enforcement of a federal statute, which it did not do. On November 8, 1976, the Court approved a Stipulation between plaintiffs and defendant by which plaintiffs "abandoned all requests heretofore entered to enjoin defendant from enforcing" Section 1382(f). Its final Order is consistent with that Stipulation.[1] The Secretary did not argue in his Jurisdictional Statement in the Supreme Court that this Court granted any prospective relief to non-class members. Finally, the Secretary has never argued that he may be held in contempt for applying Section 1382(f) to non-class members.[2]

The only conceivable effect of adding paragraph 2 of defendant's proposal is to create a technical ground[3] to attack this Court's decision in the Supreme Court. Otherwise it is wholly unnecessary.

4. Paragraph 3 of defendant's proposal incorrectly refers to paragraph 4 of the Order as its basis. That paragraph merely defines the parameters of the class to be granted relief. Paragraph 6 requires notification to the class. Since the process of identifying the class members is associated with notification, Paragraph 6 of the Order is its proper basis.

[1] Thus, plaintiffs have not requested any less relief than they have since the Stipulation.

[2] This Court's desire to have defendant follow its Judgment prospectively, will be served when the Supreme Court affirms the decision, since it is only the Supreme Court's decisions which declare the "supreme law of the land."

[3] If the Supreme Court concluded that the relief granted required a three-judge court, it would vacate the Court's order and remand with directions to convene one. *McLucas* v. *DeChamplain*, 421 U.S. 21, 32 n.12 (1975).

Finally, to avoid any dispute about the steps to identify the class which the Court has not stayed, and their cost, the stay order should incorporate the specific steps set forth in the second Audrey Hopkins Affidavit (Jan. 13, 1978). Subsequent to the hearing on the stay motion on January 23, 1978, counsel for the parties discussed the steps which defendants could take to identify class members. Defendant's counsel and expert represented that many class members would change their address between now and any final decision of the Supreme Court, and that the selection program would have to be rerun to pick up the changed addresses. Based on these representations, and to save the cost of running the selection process twice, plaintiffs' counsel agreed that the identification process could stop short of the actual selection stage and end with the "testing-and-debugging" of the program. Defendant's expert estimated that such a process would run through the first three steps in the second Hopkins Affidavit, and through about 6 to 8 hours of the fourth step, labelled "Computer Time—Test and Select Appropriate Recipients." Plaintiffs believe that specific reference to the steps of the Hopkins Affidavit will clarify precisely what defendant must do.

For all these reasons, plaintiffs request that the Court adopt their proposed Order Granting Partial Stay of Judgment.

Dated: February 17, 1978

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75-1103-GT

[Entered Feb. 17, 1978; Filed Feb. 22, 1978]

GRACE AZNAVORIAN, et al., PLAINTIFFS

vs.

JOSEPH A. CALIFANO, JR., etc., DEFENDANT

PLAINTIFFS' PROPOSED ORDER GRANTING A PARTIAL STAY OF JUDGMENT

Upon consideration of Defendant's Motion For Partial Stay of Judgment, plaintiffs' opposition thereto and the oral argument of counsel for the parties,

IT IS HEREBY ORDERED THAT:

1. Paragraph 3 of the Judgment entered on September 6, 1977, which incorporates the provisions of the Court's final Order filed on August 23, 1977 ("Order"), is hereby stayed until the Supreme Court renders a final decision in this action, to the following extent:

a. Paragraphs 5, 7 and 8 of the Order in their entirety; and,

b. Paragraph 6, lines 30-32, of the Order: ". . . defendant shall mail it [i.e., the class relief notice] within thirty (30) days to all persons who received SSI benefits at any time from September 26, 1975 to the date this Order is entered."

2. Pursuant to Paragraph 6 of the Order, defendant shall implement the process to identify the class members by (a) preparing in its entirety a computer program that can be utilized to select all NO3 designated individuals for which computer records are reliable, (b) coding, adequately testing and debugging the program and (c) having it available for selection of NO3 files not later than the date on which the Supreme Court renders a final decision in this action. These steps are set forth in the Affidavit of Audrey Hopkins (Jan. 13, 1978) ¶ 2 "Preparation of Systems Requirement," "Computer Analysts Bureau of Data Processing," "Computer Programmers Bureau of Data Processing," and "Computer Time—Test and Select Appropriate Recipients" (approximately 6-8 hours).

Dated: February 21, 1978

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
Judge
United States District Court

SUPREME COURT OF THE UNITED STATES

Nos. 77-991 and 77-5999

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

GRACE AZNAVORIAN, ETC.; and

GRACE AZNAVORIAN, ETC., APPELLANT

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE

APPEALS from the United States District Court for the Southern District of California.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

March 20, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 286505 87

FEB 18 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-991

Supreme Court U.S.
FILED
FEB 18 1978
MICHAEL RODAK, JR., CLERK

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,

Appellant,

vs.

GRACE AZNAVORIAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The United States District Court for the Southern District of California entered its judgment on September 6, 1977, (incorporating its Order of August 23, 1977) certifying this suit as a nationwide class action, declaring unconstitutional Section 1611(f) of the Social Security Act (42 U.S.C. §1382(f)), and granting certain class relief. The opinion and order of the District Court are officially reported at 440 F.Supp. 788 (S.D. Cal. 1977).

On September 22, 1977, the Secretary of Health, Education and Welfare appealed to this Court under 28 U.S.C. § 1252 from parts of the judgment adverse to him. Califano v. Aznavorian, No. 77-991. Appellant filed his Jurisdictional Statement on January 10, 1978.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-991

JOSEPH A. CALIFANO, JR., Secretary
of Health, Education and Welfare,

Appellant,

vs.

GRACE AZNAVORIAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DECLARATION IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, GRACE AZNAVORIAN, in support of my motion for leave to proceed on appeal in forma pauperis, declare:

1. I am the class representative appellee in the above-entitled case.

2. I currently receive Supplemental Security Income (SSI) (42 U.S.C. § 1382 et seq.) because of my disability and financial need. Because of my poverty I am unable to prepay any costs and fees in this appeal or give security therefor, and still be able to provide myself with the necessities of life.

3. On the basis of my attorneys' advice, I believe

Appellees are Grace Aznavorian, the class representative, and those class members granted relief by the District Court. Appellees, by their attorneys, respectfully move this Court for an order permitting them to proceed in this Court in forma pauperis, without prepayment of fees and costs or security therefor, pursuant to 28 U.S.C. §1915 and Supreme Court Rule 53. The Declaration of Grace Aznavorian is attached hereto. Appellees' Motion To Affirm Judgment is being filed with this motion.

Respectfully submitted,

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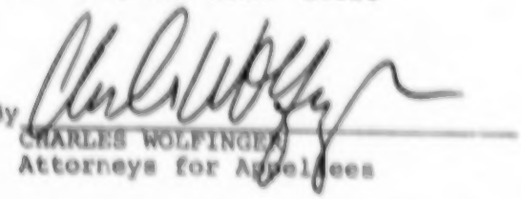
Dated: February 1978

By 
CHARLES WOLFINGER
Attorneys for Appellees

that the appellees I represent are entitled to the redress granted by the District Court. Aznavorian v. Califano, 440 F.Supp. 788 (S.D. Cal. 1977).

4. The nature of the relief granted is briefly stated as follows: Appellant, Secretary of Health, Education and Welfare, denied SSI to appellees under 42 U.S.C. § 1382(f) and 20 C.F.R. § 416.1327 solely because they travelled outside the United States for more than one month. Appellees filed timely claims for judicial review of said denials pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). The district court certified this case as a class action on behalf of appellees and all others denied SSI under Section 1383(f) between September 25, 1975 and August 23, 1977 (440 F.Supp at 792-94); ruled Section 1382(f) and 20 C.F.R. § 416.1327 unconstitutional (Id. at 795-800); and granted class relief in the form of administrative redeterminations of their eligibility. (Id. at 802, 805.)

Appellees' Motion To Affirm Judgment filed herewith contains a full description of all the reasons supporting that motion and the relief granted by the District Court.

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on 2-8-, 1978.

Grace Aznavorian
GRACE AZNAVORIAN

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-991

JOSEPH A. CALIFANO, Secretary of Health, Education and Welfare,

Appellant,

vs.

GRACE AZNAVORIAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM JUDGMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-991

JOSEPH A. CALIFANO, Secretary of Health, Education and Welfare,

Appellant,

vs.

GRACE AZNAVORIAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM JUDGMENT

Appellees move, pursuant to Rule 16 of the Rules of this Court, for the affirmance of that part of the Judgment of the United States District Court for the Southern District of California entered on September 6, 1977, which is on appeal here.[1/] That Judgment declared Section 1611(f) of the Social Security Act, (42 U.S.C. §1382(f)), which suspends Supplemental Security Income (SSI) benefits to persons who travel abroad for more than one calendar month, to be violative of the equal protection guarantees in the Due Process Clause of the Fifth Amend-

1/ Plaintiffs have appealed part of the Judgment denying certain class members relief in Aznavorian v. Califano, No. 77-5999.

ment. This motion is made on the grounds that the district court's Opinion, Order,[2] and Judgment conform to prior decisions of this Court and, therefore, Appellant's Jurisdictional Statement ("Jur. St.") does not present issues which are worthy of plenary consideration by this Court.

INTRODUCTION

Section 1382(f) [3] creates a "conclusive presumption of abandonment of United States residency upon any departure exceeding one calendar month." (440 F.Supp. at 795.) The section further precludes an applicant or recipient from reestablishing residency until he has been back in the United States for 30 consecutive days following a trip outside of the United States for 30 consecutive days. [4]

In the district court, plaintiff Aznavorian, a citizen and resident of the United States and an eligible recipient of Supplemental Security Income, challenged the constitutionality of Section 1382(f). She had travelled abroad for health reasons, not intending to remain outside of the United States for more than one month. (440 F.Supp. at 791.) However, she became ill and was unable to return to the Untied States until she had been outside the country for ten days more than one month. (Id.) Applying Section 1382(f) to her, the Secretary terminated her assistance for two full months. After exhausting her administrative remedies, Mrs. Aznavorian claimed in the district court that Section 1382(f) violated her due process and equal protection rights because it penalized her right of international travel in violation of the Fifth Amendment to

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2/ The Opinion and Order of the district court are now officially reported at 440 F.Supp. 788 (S.D. Cal. 1977).

3/ The full text of Section 1382(f) appears at 440 F.Supp. at 791.

4/ The Secretary mischaracterizes the invalidated section, stating that it "establishes an eligibility test for persons who leave the country for an extended period of time...(Jur. St. at 4-5.)

the United States Constitution. (Id.) She sought class certification, a declaratory judgment that Section 1382(f) was unconstitutional, and reversals of the Secretary's suspensions of SSI pursuant to Section 1382(f) of all class members and administrative rederminations of their residency according to proper constitutional standards. (440 F.Supp. at 791, 800-801.)[5]

On August 12, 1977, the district court issued its Opinion certifying a nationwide class of individuals denied SSI solely pursuant to Section 1382(f), declared Section 1382(f) unconstitutional under the Fifth Amendment, and granted class relief to appellee class members while denying it to appellant class members in Aznavorian v. Califano, No. 77-5999. (440 F.Supp. at 791-800.) The court issued its Order on the Opinion on August 23, 1977, (440 F.Supp. at 804-806) and its Judgment on September 6, 1977. (Jur. St. at 41A.)

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5/ Although appellees initially sought injunctive relief and the convening of a three-judge court in their complaint, they and the Secretary stipulated on November 5, 1976 that "plaintiffs...abandon[ed] all requests heretofore entered to enjoin defendant from enforcing 42 U.S.C. § 1382(f)."

ARGUMENT

I

42 U.S.C. §1382(f) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Historical Recognition of the Right to Foreign Travel

The right to foreign travel was recognized in the Magna Carta as early as the year 1215. See W. Swindler, Magna Carta - Legal and Legacy, 321-324 (1965). This right was recognized in the common law by the early seventeenth century. Parker, The Right to Go Abroad: To Have and to Hold a Passport, 40 VA. L.REV. 853, 868 (1954); Note, Passports and Freedom to Travel: The Conflict of a Right and a Privilege, 41 GEO. L.J. 63, 70 (1952). As noted repeatedly by this Court, "[t]he language of the constitution and of many acts of Congress could not be understood without reference to common law." Moore v. United States, 91 U.S. 270, 274 (1875); Schick v. United States, 195 U.S. 65, 69 (1904). And, "Blackstones Commentaries are accepted as the most satisfactory exposition" of the common law of England. Schick v. United States, supra, 195 U.S. at 69. Blackstone treated freedom of movement as a "personal liberty" that could not be restrained "unless by due course of law." W. Blackstone, Commentaries at 134.

The early American colonies recognized and protected the right to freedom of movement within and without national boundaries. See Chafee, Three Human Rights in the Constitution of 1787 at 171-181, 187 et seq. (1956).

B. Constitutional Standards For Measuring Infringements On The Right To Foreign Travel

While the Constitution contains no express grant of freedom to intrastate, interstate or foreign travel, this Court has stated:

> Undoubtedly the right of locomotion, the right to remove from one place to another according

> to inclination, is an attribute of personal liberty... Williams v. Fears, 179 U.S. 270, at 274 (1900).

See also Crandall v. Nevada, 6 Wall. 35, 44 (1868); Hague v. C.I.O., 307 U.S. 496 (1939); Edwards v. California, 314 U.S. 160, 177 (1941).

On three occasions this Court has decided foreign travel cases without specific reference to a rigid two-tier formula distinguishing between "strict scrutiny" and a "rational basis" review. Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Zemel v. Rusk, 381 U.S. 1 (1965). However, an analysis of these decisions leaves no doubt that in each instance the Court invoked a heightened scrutiny virtually identical to that employed in more recent interstate travel cases. See Shapiro v. Thompson, 394 U.S. 618, 630-631 (1969); Memorial Hospital v. Maricopa County, 415 U.S. 250, 254 (1974).

In Kent v. Dulles, supra, this Court for the first time dealt with the scope of protection afforded the right to travel abroad by the Fifth Amendment. The Government in Kent conceded that the right to travel abroad is a fundamental constitutional right to be equated with the right to travel from state to state and hence can be abridged only in conformity with the Fifth Amendment. (Brief for Respondent at 26-27.) It argued then, as it does here (Jur. St. at 8), that it could place any "reasonable restrictions" upon the foreign travel of its citizens. (Brief for Respondent at 67-69.)

Although the Court in Kent found that "[w]e need not decide the extent to which [the right to travel abroad] can be curtailed", it defined the right as "an important aspect of the citizen's 'liberty'" guaranteed in the Due Process Clause of the Fifth Amendment (357 U.S. at 127), and stated:

> The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment ... Freedom of movement across frontiers

> in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country ..., may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. (357 U.S. at 125-126.) 6/

In reversing the passport restrictions in Kent, the Court noted that where foreign travel is involved, it will "construe narrowly all delegated powers that curtail or dilute" the right. (357 U.S. at 129.)

Six years later, Aptheker v. Secretary of State, supra, presented "the first [case] in which this Court has been called upon to consider the constitutionality of ... restrictions ... on the right to travel [abroad]." The Government again argued, as it does here, that the right could be curtailed by "regulation which is reasonably in relation to its subject" and that "reasonable regulation" could be constitutionally imposed. (Brief for Appellee at 12-13.) Its assertion, which undervalues the right under examination, was emphatically rejected by this Court:

> Although previous cases have not involved the constitutionality of statutory restrictions upon the right to travel abroad, there are well-established principles by which to test whether the restrictions here imposed are consistent with liberty guaranteed in the Fifth Amendment. It is a familiar and basic principle ... that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". * * * *
>
> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light

6/ The Kent decision made no distinction between interstate and foreign travel, and relied upon Crandall v. State of Nevada, supra, Williams v. Fears, supra, and Edwards v. California, supra, involving travel within the United States. (357 U.S. at 126.)

> of less drastic means for achieving the same basic purpose." Aptheker v. Secretary of State, supra, 378 U.S. at 508.

The Court in Aptheker therefore completely and unequivocally rejected the Government's claims, virtually identical to those made in this case, that the restrictions on Herbert Aptheker's freedom of travel need only be constitutionally measured by a "reasonable" test. While in Aptheker the purpose for limiting travel concerned national security, the Court nevertheless found that "less drastic" means were available for "achieving the congressional objective" sought in the challenged statute. (378 U.S. at 512-512.) The Court further found that the limitation was not "narrowly drawn to prevent the supposed evil" and that "precision must be the touchstone of legislation so affecting basic freedoms." (378 U.S. at 514.)

The Court in Aptheker, finding that the "freedom of travel is a constitutional liberty closely related to rights of free speech and association" (378 U.S. at 517)(emphasis added), cited Shelton v. Tucker, 364 U.S. 479, 488 (1960) and NAACP v. Button, 371 U.S. 328, 438 (1963), in establishing that the methods employed to achieve the government purpose were impermissible because "less drastic means" were available. (378 U.S. at 508.) Contrary to the Secretary's assertions on the difference between the rights of interstate and international travel (Jur. St. at 8-9), an analysis of Shapiro and Maricopa County shows that they rely on the same standards enunciated in Shelton and Button as were relied upon in Aptheker. Both Shapiro and Maricopa County, citing Shelton and Button, invalidated durational residency requirements as infringing on the right to travel because "less drastic means [were] available" to achieve the government interest. (394 U.S. at 636-

37; 415 U.S. at 267.) 7/

Zemel v. Rusk, supra, is the most recent international travel case to be decided by this Court, and the only one the Secretary is willing to acknowledge. (Jur. St. at 9; Defendant's Motion for Dismissal and Summary Judgment at 18.) But even Zemel mandates constitutional standards far more stringent that the "rational basis" test urged by the Secretary. (Jur. St. at 8.) The Court devoted much of its analysis in Zemel to an examination of the "extent of the necessity for the restriction on travel." (381 U.S. at 10-17.) It was concluded that the "weightiest considerations of national security" supported the challenged restriction and that travel to Cuba may have involved "dangerous international incidents..." (381 U.S. at 15.) This Court was clearly looking for, and found, a government interest having more than just some "rational basis".

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7/ Recognizing this analysis, many courts have cited Aptheker as standing for application of the "compelling state interest" test. See, e.g., Cook v. Hudson, 511 F.2d 744, 751 (5th Cir. 1975) (J. Clark, dissenting); Baird v. Lynch, 390 F.Supp. 740, 749 (W.D. Wis. 1974) (three-judge court); Meek v. Pittenger, 374 F.Supp. 639, 652-653 (E.D. Pa. 1974), modified other gds. 421 U.S. 349 (1975); Flint v. Mullen, 372 F.Supp. 213, 217 (D. R.I. 1973), rev'd other gds. 499 F.2d 100 (1st Cir. 1974); Krzewinski v. Kugler, 338 F.Supp. 492, 498 (D. N.J. 1972).

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In Zemel, as in other decisions of this Court and of the lower courts, 8/ no clear distinctions are manifested between internal and external travel.

While limitations on the right to travel may often involve concurrent limitations on the rights of associations, speech and the "free flow of information" (Zemel v. Rusk, supra, 381 U.S. at 16), this Court has held that these incidental restrictions do not turn the right to travel into a First Amendment right. (381 U.S. at 16-17.) The Court has therefore specifically rejected the notion that the constitutional standards enunciated in Zemel were applied because of First Amendment rights allegedly present in that case: "we cannot accept the contention that it is a First Amendment right which is involved." (381 U.S. at 16.) The standards enunciated in Kent, Aptheker and Zemel were not arrived at because of the incidental First Amendment issue present in those cases, but rather because the

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8/ See note 7 supra; Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (noting the right to travel is a "basic right" and citing internal and external travel cases interchangeably); Zschernig v. Miller, 398 U.S. 429, 441 (1968)(citing internal and external cases interchangeably); Aptheker v. Secretary of State, supra, 378 U.S. at 519-520 (Justice Douglas concurring); Bell v. Maryland, 378 U.S. 226, 250 (1964)(discussing "the right to travel", citing both internal and external travel cases without distinction); Kent v. Dulles, supra, 357 U.S. at 126 ("Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage." Kent relied on interstate travel cases to support the constitutional standards it erected for application in foreign travel cases); United States v. Davis, 482 F.2d 893, 912 (9th Cir. 1973)(the right to travel abroad is a "fundamental constitutional right of every American citizen." (Emphasis added.); United States v. Cyzewski, 484 F.2d 509, 511 n.2 (5th Cir. 1973), cert. denied, 415 U.S. 902 (1973); King v. New Rochelle Muni. Housing Auth., 442 F.2d 646, 648 (2nd Cir. 1971); Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970) aff'd 405 U.S. 438 (1972); Wilson v. United States, 366 F.2d 666, 668 n.2 (D.C. Cir. 1966)(Bazelon, C.J., concurring); Schactman v. Dulles, 225 F.2d 938, 944 (D.C. Cir. 1955)("Freedom to leave a country or a hemisphere is as much a part of liberty as freedom to leave a State."); Bauer v. Acheson, 106 F.Supp. 445, 451 (D. D.C. 1952)("[I]t is difficult to see where freedom to travel outside the United States is any less an attribute of personal liberty [than freedom to interstate travel].")

"freedom of travel is a constitutional liberty closely related to the rights of free speech and association..." Aptheker v. Secretary of State, supra, 378 U.S. at 517 (Emphasis added.) The tests of Kent and Aptheker were applied in Zemel despite the fact that the restrictions there were not applied "because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens." (381 U.S. at 13.) Incidental impositions on First Amendment rights, arising because of foreign travel restrictions, were considered and led this Court to hold that "the right to travel [abroad] is protected by the Fifth Amendment." (381 U.S. at 16, n.17.) See Aptheker v. Secretary of State, supra, 378 U.S. at 519-520 (Douglas, J., concurring.)

The standards established in Kent, Aptheker and Zemel, were correctly applied by the district court to measure the constitutionality of Section 1382(f). (440 F.Supp. at 795-800.) The due process and equal protection challenge raised by appellees could not be answered by application of the passive "rational basis" test.

C. The District Court Correctly Held That Section 1382(f) Does Not Bear A Fair And Substantial Relationship To Its Avowed Purpose And Therefore Violates the Fifth Amendment. 9/

The Secretary claims that since the enforcement of Section 1382(f) "does not directly inhibit or regulate" the right to international travel, the only issue is the allocation of non-contractual, social welfare benefits. (Jur. St. at 10.) Appellee Aznavorian lost two months of benefits, which provide her with the basic necessities of life, because she traveled outside the United States for a few days in excess of one calendar month. (440 F.Supp. at 791) In Memorial Hospital v. Maricopa County, supra, 415 U.S. at 259, this Court stated: "In Shapiro, the Court found denial of the basic 'necessities of life' to be a penalty."

In Dunn v. Blumstein, 405 U.S. 330, 339-340 (1972), it was again pointed out that:

> Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In Shapiro, we explicitly stated that the compelling state interest test would be triggered by 'any classification which serves to penalize the exercise of that right [to travel].' (Emphasis in original; footnote omitted.)

As the passport restriction in Aptheker imposed a "severe restriction" on travel abroad (375 U.S. at 507), so Section 1382(f) imposes a severe restriction on foreign travel in excess of 30 days because it triggers a termination of funds otherwise used by the blind, the disabled and the elderly, to survive. It also unreasonably deters foreign travel on the part of SSI recipients. Intervenors Anna Tolstick, 79-years old, and Betsabe Rivas, 81-years old, SSI recipients and residents of New York City, wished to visit relatives and their homelands of Russia and Columbia once more before they die. (Complaint for Intervention for Declaratory and Injunctive Relief and Relief in the Nature of Mandamus at 4.) They communicated in writing with the Secretary concerning their need for continued receipt of SSI benefits while traveling abroad for two months. (440 F.Supp. at 795.) They received written responses indicating that if they took their planned trips their

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9/ In the district court plaintiff Aznavorian argued that the right to travel abroad was a "fundamental right" triggering "strict scrutiny" analysis. (Plaintiff's Supplemental Memorandum Supporting Motions for Intervention and Application for Convening Three-Judge Court, and Opposing Defendant's Motion to Dismiss and for Summary Judgment at 2-10.) The district court instead found that while the "right to travel abroad is certainly a very important right...it should not be placed on an equal footing with the right to travel interstate." (440 F.Supp. at 796.) However, the district court also found that "infringement of this travel right is deserving of much closer scrutiny than that given under the 'rational basis' test." (440 F.Supp. at 797.) Appellee continues in the belief that the right is fundamental. Seeking only to affirm the result reached by the district court, and not its reasoning, appellee finds it unnecessary to brief why Section 1382(f) fails under a strict scrutiny analysis. She only seeks herein to establish that Section 1382(f) bears neither a substantial nor rational relationship t o its intended purpose.

SSI benefits would be suspended or terminated due to application of Section 1382(f). (440 F.Supp. at 795.) While the district court held that it lacked subject matter jurisdiction over their complaint, they were clearly deterred from traveling by the threatened loss of survival benefits.

As already noted above, appellee lost two months of vital benefits because of her brief trip outside the United States fortuitously extended a few days over the one-month limit by illness. (440 F.Supp. at 791) She would not agree with the Secretary that Section 1382(f) only affected her "remotely."

The Secretary argues that the district court should have measured Section 1382(f) against the "rational basis" test, "traditionally employed...in assessing whether social welfare classifications satisfy the requirements of due process and equal protection." (Jur. St. at 7-9.) The cases relied upon by the Secretary "are not controlling because Section 1382(f) implicates constitutionally protected conduct" and must, therefore, be measured against a test "more exacting than the 'rational basis' standard urged by defendant." (440 F.Supp. at 796.) While Califano v. Jobst, ___ U.S. ___, 98 S.Ct. 95 (1977) upheld termination of child's benefits upon marriage (Jur. St. at 7), this Court clearly stated that "[b]oth tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status." (98 S.Ct. at 99.) It can hardly be said that in today's world, the mere "fact" of travel for more than 30 days "characteristically signifies" abandonment of the traveler's residence in the United States. Jobst further recognized that broad legislative classifications must be judged "by reference to characteristics typical of the affected classes" rather than by focusing on "selected, atypical examples." (98 S.Ct. at 100.) Again, given modern travel facilities it would be irrational to conclude

that a "typical" person traveling abroad for more than 30 days has, in fact, abandoned his home in the United States. Marriage has historically acted as a determinative factor in creating presumptions concerning dependency in social welfare programs. Califano v. Jobst, supra, 98 S.Ct. at 99; Mathews v. de Castro, 429 U.S. 181 (1976); Weinberger v. Salfi, 422 U.S. 749, 778-784 (1975). By contrast, "tradition" and "common experience" do not support the conclusion that exercising the right to travel for brief periods of time "normally marks" the abandonment of residency. In fact, the Secretary "concedes that he maintains no statistics to substantiate that the one month or 30 day travel period is substantially related in fact to abandonment or establishment of residency." (440 F.Supp. at 798.) 10/

This Court, in Reed v. Reed, 404 U.S. 71, 76 (1971), determined that a gender-based distinction violated the Fifth Amendment unless it reflected a fair and substantial relationship in fact to the governmental purposes sought to be achieved by the distinction. See also Califano v. Goldfarb, 97 S.Ct. 1021, 1026-1027 (1977); Craig v. Boren, 97 S.Ct. 451, 457 (1976). As recognized by the Secretary, the Court in these cases did not apply the strict scrutiny standard invoked by "fundamental" rights, nor did it apply a "rational basis" test. (Jur. St. at 8-9.) Gender-based distinctions are forbidden when supported by "no more substantial justification than 'archaic and overbroad' generalizations ... [that do not coincide with] contemporary reality." Califano v. Goldfarb, supra, 97 S.Ct. at 1026-1027. These cases indicate that when an important right is at stake, this Court will invoke a constitutional test more stringent than the

10/ More recently, this Court has termed the right to marriage as "fundamental" (Zablocki v. Redhail, ___ U.S ___, 46 U.S.L.W.4093, 4097, decided January 18, 1978), and required a "critical examination" of the governmental interests advanced in support of the restriction on marriage. (46 U.S.L.W. at 4096.)

"rational basis" standard.

The district court, recognizing the constitutional standards already established by this Court in Kent, Aptheker and Zemel, cautiously applied the equal protection analysis of Reed to measure the Fifth Amendment limitations of Section 1382(f). The Reed analysis was applied to Section 1382(f) in conjunction with the rules enunciated in Kent, Aptheker and Zemel. (440 F.Supp. at 795-800.)

The Secretary argues that Section 1382(f) creates an "easily administrable demarcation" between residents and non-residents of the United States, implementation of which "is rationally related" to the purpose of paying SSI benefits only to United States residents. (Jr. St. at 10.) 11/ But in fact, Section 1382(f) establishes a "loss of residency" standard. As the district court noted, it creates "a conclusive presumption of abandonment of United States residency upon any departure exceeding one calendar month." 12/ (440 F.Supp. at 795.) The challenged statute further precludes an applicant or recipient from establishing or re-establishing residency until he has returned to the United States and waited for 30 consecutive days.

Administrative convenience alone is not a substantial enough reason to justify penalizing the basic constitutional right to international travel. See Memorial Hospital v. Maricopa Co., supra, 415 U.S. at 267 (rejecting the government's position that the residency period was a "convenient rule of thumb to determine bona fide residence "); Shapiro v. Thompson, supra,

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11/ Appellant concedes that Section 1382(f) "does not provide a perfect method of preventing non-residents from receiving SSI benefits. Nor does it necessarily comprise the best method available for accomplishing that objective." (Jur. St. at 11.)

12/ Appellees also challenged Section 1382(f) as violating due process guarantees because of its presumptive nature. But the district court held it unnecessary to rule on that issue. (440 F.Supp. at 799 n.12.)

394 U.S. at 636; Reed v. Reed, supra, 404 U.S. at 76.

The Secretary justifies the need for the "administrable demarcation" on the sole ground that "[w]ithout a simple test ... the Social Security Administration would be faced with the formidable task of determining whether each SSI recipient who leaves the United States is abandoning his residence ..." (Jur. St. at 10.) An analysis of the basic eligibility statutes and the Secretary's regulations clearly establishes that he would not face any "formidable task" without the assistance of the conclusive presumption in Section 1382(f). To determine United States residency, he in fact employs alternative methods. Section 1382c(a)(1)(B) clearly sets forth as one criterion for eligibility that the applicant must be "a resident of the United States ..." The initial SSI application form contains various questions aimed at establishing this residency. 13/ Section A5010 of the Social Security Claims Manual indicates that the recipient must report any change of mailing address or residence. Section A2101 provides the following language on residence:

> For purposes of title XVI, a person becomes a resident when he arrives in one of the fifty (50) states or the District of Columbia with the intent to establish his home there. When his arrival is of recent date and he has not established a permanent home, the intent to establish a home may be inferred from such actions as arranging for rental or purchase of a dwelling, obtaining or seeking employment, joining a church or the like. (Emphasis added.)

The key to residence is clearly the existance of a "home", or the "intent" to establish a "home". The "intent" may be "inferred" from other logical criteria.

As in Aptheker, "[t]he broad and enveloping prohibition [here required by Section 1382(f)] indiscriminately excludes

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13/ Claims Manual Section 12118, indicates that Item 4 of the application requires a statement as to the length of U.S. residency possessed by the applicant, and Item 8 requires the applicant to state how long he/she has been residing in the state. Item 13 requires the applicant to indicate whether he she owns or rents a home. The application form is signed under penalty of perjury.

plainly relevant considerations such as the individual's knowledge [appellee had no intention of abandoning residence], activity [recipient maintains a home, furniture, etc., in the United States] ... and purposes in and place for travel [appellee's trip was solely for health reasons]." (378 U.S. at 514) (Emphasis added.)

Finally, the Secretary argues that the provision of Section 1382(f) requiring individuals to be physically present in the United States after a trip abroad for at least 30 consecutive days in order to restore benefits "offers a simple means" by which a "continuing intention" to be a resident "may be evidenced." (Jur. St. at 11.) However, Section 1382(f) does little to assist in evidencing residency. On the contrary, as noted by the district court, "the dishonest applicant/recipient could just as easily swear to having fulfilled the requirement as not." (440 F.Supp. at 798.) See Memorial Hospital v. Maricopa Co. supra, 415 U.S. at 268. Moreover, the avowed purpose of Section 1382(f) could "be defeated by the recipient simply entering the United States for one day during the calendar month or thirty consecutive day period" thereby avoiding entirely application of the statute. (Id.) See 20 C.F.R. §416.325.

As in Aptheker, "less drastic means [are available to the Secretary] for achieving the same basic purpose" sought by Section 1382(f). (378 U.S. at 508.) Given the alternative methods already used by the Secretary to determine residency, it is clear that "less drastic means are available, and are employed," to ensure SSI payments only go to residents of the United States. Shapiro v. Thompson, supra, 394 U.S. at 637.

The district court correctly applied the equal protection and due process standards enunciated in Kent, Aptheker, Zemel and Reed to invalidate Section 1382(f) for infringing on the right to international travel. Thus, the Secretary's first question presented does not deserve plenary review.

II

THIS SUIT WAS PROPERLY
CERTIFIED AS A CLASS ACTION
UNDER 42 U.S.C. § 405(g)

The Secretary argues under his second "Question Presented" that (1) Section 405(g) precludes all class actions; and (2) the district court improperly granted injunctive relief to class members. These assertions do not merit plenary review.

1. Section 405(g) permits class actions as the Courts of Appeals have uniformly recognized. See, e.g., Liberty Alliance v. Califano, Nos. 77-1010/11 (3rd Cir. December 6, 1977); Elliott v. Weinberger, 564 F.2d 1219, 1229-1230 (9th Cir. 1977); De Lao v. Califano, 560 F.2d 1384, 1387 (9th Cir. 1977); Wilson v. Edelman, 542 F.2d 1260, 1275 (7th Cir. 1976); Tatum v. Mathews, 541 F.2d 161, 163-164 (6th Cir. 1976); Johnson v. Mathews, 539 F.2d 1111, 1125-1126 (8th Cir. 1976); Jimenez v. Weinberger, 523 F.2d 689, 694-696 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). These decisions reason that Section 405(g) does not expressly bar class actions and that if the requirements of Federal Rule of Civil Procedure 23 are met, such class actions save judicial and administrative resources by avoiding the piecemeal resolution of individual Section 405(g) claims. Elliott v. Weinberger, supra, 564 F.2d at 1229-1230; Liberty Alliance v. Califano, supra, (Slip Opinion at 16).

The Secretary ignores the foregoing authorities while relying instead on Weinberger v. Salfi, 422 U.S. 749 (1975), and Jablon v. Secretary of Health, Education and Welfare, 399 F.Supp. 118, 124 (D. Md. 1975), sum. aff'd sub nom, Jablon v. Califano, 430 U.S. 924 (1977). Neither case holds that Section 405(g) bars all class actions.[14/] Salfi only disapproved a par-

14/ Indeed, no decision of this Court makes this holding. See Norton v. Mathews, 427 U.S. 524, 530 n.7 (1976); Mathews v. Diaz, 426 U.S. 67, 72 n.3 (1976).

ticular certified class because of its deficient definition (422 U.S. at 764), which the district court noted. (440 F.Supp. 792.) As Justice Stevens explained in Jimenez v. Weinberger, supra, 523 F.2d at 694-695:

> [I]f the Court did not believe a class action could ever be maintained under the Social Security Act, there would have been no need to analyze the shortcomings of the particular class which Salfi represented.

In Jablon, the plaintiffs withdrew their class motion, making the district court's class discussion unalloyed dicta. This Court's summary affirmance of the Jablon district court opinion "'affirm[ed] the judgment but not necessarily the reasoning by which it was reached.'" Mandel v. Bradley, 97 S.Ct. 2238, 2240 (1977).

The Secretary next claims that the Section 405(g) language providing for judicial review of a "final decision of the Secretary made after a hearing to which [the plaintiff] was a party..." "reveals a congressional design to bar class suits and to permit adjudication of individual claims only." (Jur. St. at 12.) He cites no legislative history to support any such "design". Indeed, Section 405(g), added to the Act in 1939, was not intended to bar class actions, but to establish the means by which Social Security claimants would gain access to the courts. There is absolutely no indication on the face of the statute or in the legislative history of the 1939 Amendments that Congress intended to bar class actions under the Act. The section was not added as a restriction of a previously broader grant of judicial review: it was added simply in order to make clear that there was judicial review of the Secretary's decisions, and that available remedies and scope of review were to be "similar to those made for the review of decisions of many administrative bodies." Senate Report, No. 734, 76th Cong., 1st Sess. 52 (1939). Congress simply wanted to conclusively establish a remedy, so that claimants would be assured access to the courts.

The Secretary argues that preclusion of class actions is also warranted because Social Security claims "inevitably turn upon particular facts" requiring case-by-case adjudication. (Jur. St. at 13 citing Norton Brief at 12-13.) But, as Justices Stevens, Brennan and Marshall stated in Norton v. Mathews, supra, 427 U.S. at 535-536:

> [We] cannot see why the need for case-by-case adjudication is not fully satified by limiting the plaintiff class to those who have satisfied the prerequisites to an action under §205(g). By definition, such persons have been denied relief for failure to meet the statutory requirement under constitutional attack and upon an administrative record sufficiently complete to permit judicial review. Once such persons are identified from their administrative records, relief may be granted expeditiously (footnotes omitted). 15/

These observations apply to the class certified by the district court.

Appellee class members have the same constitutional claims against Section 1382(f) and had their SSI suspended on a common factual basis, namely their absence from the United States for more than one calendar month. (440 F.Supp. at 793.) Accordingly, the district court "expeditiously" ordered relief expressly provided by Section 405(g): reversals of appellees' suspensions and opportunities for new administrative residency determinations with appropriate individual recoveries of SSI benefits wrongfully denied. (440 F.Supp. at 805-806.) This relief avoids any need for the district court to determine the individual facts of each class member's claim and accommodates the Secretary's interest in case-by-case adjudication. The Secretary, thus, has adduced no support for the absolute preclusion of class actions under Section 405(g).

The Secretary cannot argue that certification was erroneous in this case since he conceded in the district court

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15/ The Norton majority did not reach the class issues presented here because it upheld the constitutionality of another statute. (427 U.S. at 530.)

that the instant class was properly defined. (Defendant's Brief in Opposition to Plaintiff's Motion for Class Action Certification at 1.) The court defined the class so that every member individually satisfied the judicial review requirements of Sections 405(g) and 1383(c)(3). (440 F.Supp. at 792-93.) As such, the certified class was identical in all material respects to those in Jimenez v. Weinberger, supra, 523 F.2d at 695-696, and Oliver v. Califano, CCH Unemployment Ins. Rep. ¶15,244 at 2499-120 (C.D. Cal. 1977). For more detailed discussion, see Appellants' Jurisdictional Statement in Aznavorian v. Califano, No. 77-5999 at 4-5, 7-8, 10-11.

2. The Secretary also asserts that "...Section 405(g) does not empower the district court to grant injunctive relief beyond the particular applicants before the court." (Jur. St. at 12-13.) He does not contend that the relief granted Mrs. Aznavorian, however characterized, [16] was precluded by Section 405(g), only the relief granted to the class. If the relief granted Mrs. Aznavorian was proper, the same relief to the individual class members was also, and the Secretary's "class relief" argument is just his "absolute preclusion" argument (See, supra, at 17) in disguise.

The district court declared Section 1382(f) unconstitutional, reversed the Secretary's suspensions of SSI to Mrs. Aznavorian and appellee class members, and ordered him to repay SSI to Mrs. Aznavorian, and to provide the class members with an opportunity for proper administrative determinations of their United States residency. (440 F.Supp. at 803, 805.) This Court has approved such relief to individuals under Section 405(g). It has held that district courts may issue judgments under Section 405(g) and (h) declaring sections of the Social Security Act unconstitutional. Weinberger v. Salfi, supra, 422 U.S. at 762; Fleming v. Nestor, 363 U.S. 603, 607 (1960). It has also

16/ The Secretary has characterized the district court's order as "...enjoining...[him]...from enforcing..." Section 1382(f). (Jur. St. at 6.) Not one word in that opinion "enjoins" him from suspending SSI pursuant to that section. Regardless of the accuracy of his description, he does not argue that the court's relief to Mrs. Aznavorian exceeded its power under Section 405(g). (footnote 16 cont.)

approved Section 405(g) orders reversing unconstitutional benefit denials and either requiring automatic payment of benefits (Goldfarb v. Secretary of Health, Education and Welfare, 396 F.Supp. 308, 309 (E.D. N.Y. 1975), aff'd Califano v. Goldfarb, 430 U.S. 199 (1977)), or opportunities for administrative determinations pursuant to constitutional standards. E.g., Jimenez v. Weinberger, 417 U.S. 628, 637-638 (1974). The only limitation on such relief is that it cannot "reach beyond the particular [recipients] before the Court." Weinberger v. Salfi, supra, 422 U.S. at 763. Since all the appellee class members are before the court in a properly maintained class action, the class relief granted by the district court is clearly authorized. See Johnson v. Mathews, supra, 539 F.2d at 1126; Jimenez v. Weinberger, supra, 422 F.2d at 694.

III

SOVEREIGN IMMUNITY DOES NOT BAR RECOVERY OF UNCONSTITUTIONALLY DENIED SSI BENEFITS

Answering the third "Question Presented", the Secretary effectively asserts that sovereign immunity permits him to run roughshod over the constitutional rights of the poorest of our citizens with impunity. He says they may not recover vitally necessary SSI unconstitutionally denied to them. He cannot be successful on this point because to do so he would have to erase decades of judicial decisions awarding Social Security benefits illegally denied. See, e.g., Ayers v. Hobby, 123 F.Supp. 115, 118 (D. Va. 1954). The Secretary does not, indeed cannot, cite any social security decisions holding that sovereign immunity precludes courts from granting recipients and applicants the benefits denied solely pursuant to an unconstitutional statute,

16/ Cont'd.: Nor does he suggest or argue that it issued an "injunction" that could only be entered by a three-judge court. (See 2, n.3, supra.) And he does not argue that the order enjoins his prospective enforcement of Section 1382(f). This Court has not ruled whether such an order is permitted by Section 405(g). (See Norton v. Mathews, supra, 427 U.S. at 530 n.7), although two Courts of Appeals have authorized such relief. In re Letourneau, 559 F.2d 892, 893 (2d Cir. 1977); Jimenez v. Weinberger, supra, 523 F.2d at 694.

either by automatic payment of such benefits or by the opportunity to recover them after administrative remands. Numerous decisions approve such relief. E.g., Jimenez v. Weinberger, supra, 417 U.S. at 637-638; Goldfarb v. Califano, supra, aff'g. 396 F.Supp. at 309; Weinberger v. Weisenfeld, 420 U.S. 636 (1975), aff'g. 367 F.Supp. 981, 989 (D. N.J. 1973); Griffin v. Richardson, 409 U.S. 1069 (1972), aff'g. 346 F.Supp. 1126, 1237 (D. Md.).

Contrary to his Jurisdictional Statement at 13, the Secretary has repeatedly interpreted Sections 405(g) and (h) in this Court as a limited waiver of sovereign immunity. (See, e.g., Brief for Appellants in Weinberger v. Salfi at 17.) In fact, he has done so throughout this case, both in the district court (Defendant's Supp. Brief Opposing Three-Judge Court at 5), and here (Norton Brief at 21):

> Under [the scheme provided by Sections 405(g) and (h)], every claimant properly before the court who establishes a meritorious claim may obtain fully adequate relief without issuance of any injunction restraining operation of the statute. If the claimants' contentions, constitutional or otherwise, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards).

This consistent interpretation of Sections 405(g) and (h) by the agency charged with its administration is entitled to great weight. See, e.g., Fribourg Navigation Co. v. C.I.R., 383 U.S. 272, 281 (1966); Blew v. Richardson, 484 F.2d 889, 892 (7th Cir. 1973). Indeed, courts have relied on it by specifically holding Section 405 a limited waiver of sovereign immunity, permitting the relief granted here. E.g., Jimenez v. Weinberger, supra, 523 F.2d at 702, 704 n.33; Gaither v. Gardner, 295 F.Supp. 458, 459 (D. Md. 1969); Cohn v. Federal Security Administrator, 199 F. Supp. 884, 885 (W.D. N.Y. 1961).

The Secretary's citations to De Lao, Tatum and Johnson (Jur. St. at 13) do not support his assertion that sovereign

immunity has not been waived in Social Security cases. Even if Section 405(g) "only creates a basis for federal jurisdiction" (Jur. St. at 13), "two other federal statutes...confer a substantive right to recover" unconstitutionally denied SSI. Cf. United States v. Testan, 424 U.S. 392, 398 (1976). In Salfi, this Court (422 U.S. at 762) interpreted Section 405(h) as authorizing an action, like this one, "'to recover on any [Social Security] claim' [because] of allegedly unconstitutional statutory restrictions." (Emphasis added.) The second statute authorizing recovery of unconstitutionally denied SSI is 42 U.S.C. §1383(b):

> Whenever the Secretary finds that...less than the correct amount of benefits has been paid with respect to an individual, proper ...recovery shall...be made by appropriate adjustments in future payments to such individual...(Emphasis added.) 17/

The district court correctly noted that Section 1383(b) authorizes recovery of underpayments for "any mistaken denial," constitutional or otherwise. (440 F.Supp. at 802.)

De Lao, Tatum and Johnson approve this interpretation of Section 1383(b) as constituting a limited waiver of sovereign immunity. As stated in De Lao v. Califano, supra, 560 F.2d at 1391:

> ...Congress has authorized retroactive payments to those who are found eligible after a hearing. It is only those found not eligible who will not get retroactive payments. Retroactive relief for them is barred by sovereign immunity.

See also Tatum v. Mathews, supra, 541 F.2d at 166 n.5; Johnson v. Mathews, supra, 539 F.2d at 1125. 18/

17/ The Secretary's regulations also provide for the opportunity to recover underpayments. 20 C.F.R. §§416.535 - .543. Appellants' Jurisdictional Statement in Aznavorian v. Califano, No. 77-5999 at 8-9 discusses these regulations.

18/ This is obviously not a suit for money damages, as the Secretary contends. Nor is it a suit to recover retroactive benefits for potentially ineligible persons as in De Lao, Tatum and Johnson. In those cases, persons who had not yet been determined eligible for benefits sought retroactive payments for the period between their terminations and reaffirmations of ineligi-

(footnote 18 continued)

Appellee class members requested, and the district court granted, only the type of relief recognized in De Lao, Tatum, and Johnson: an opportunity to prove they did not in fact abandone their residences during their brief trips outside the country. Only those who did not abandon their residences will be entitled to recover the SSI unconstitutionally denied. (440 F.Supp. at 801, 803.) Thus, the Secretary has produced no authority to show that Sections 405(g) and (h) and 1383(b) and (c) do not constitute a limited waiver of sovereign immunity authorizing this relief. 19/

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18/ Cont'd.: bility by the Secretary after a hearing. Those ineligible plaintiffs contended due process entitled them to benefits pending a hearing which redetermined ineligibity. The due process clause is not a waiver of sovereign immunity.

19/ Edelman v. Jordan, 415 U.S. 651 (1974) is not relevant. (Jur. St. at 14.) There, this Court held, inter alia, that a state's participation in the federal-state Aid to the Aged, Blind and Disabled Program ("AABD"), which on January 1, 1974 became the federal SSI program involved here (415 at 653 n.2), did not constitute a waiver of its Eleventh Amendment immunity from a federal court suit for retroactive welfare benefits. (415 U.S. at 671-72.) The basis for its ruling was that under the federal statutes authorizing the AABD program, a "...congressional authorization to sue a class of defendants which literally includes States is wholly absent." (415 U.S. at 672.) Congress has specifically authorized suits in federal court against the Secretary to review and recover erroneously denied SSI benefits 42 U.S.C. §§405(g) and (h), 1383(b) and (c). The Edelman decision was limited to the narrow waiver of Eleventh Amendment immunity, and not the broader question of the waiver of sovereign immunity. Rhodes v. Weinberger, 388 F.Supp. 7 442 (E.D. Pa. 1975).

CONCLUSION

For the foregoing reasons, this Court should summarily affirm that portion of the district court's judgment from which the Secretary appeals.

DATED: February 10, 1978

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Nos. 77-991 and 77-5999

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

GRACE AZNAVORIAN, ETC.

GRACE AZNAVORIAN, ETC., APPELLANTS

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-991

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

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OPINION BELOW

The opinion of the district court (J.S. App. 1A-33A)[1] is reported at 440 F. Supp. 788.

JURISDICTION

The district court's order was entered on August 23, 1977 (J.S. App. 34A-38A) and its judgment on September 6, 1977 (J.S. App. 39A-40A). The Secretary's notice of appeal to this Court was filed on September 22, 1977 (J.S. App. 41A) and Aznavorian's notice of cross-appeal was filed on October 4, 1977 (No. 77-5999 J.S. App. 41a-42a). On March 20, 1978, this Court noted probable jurisdiction of both appeals and consolidated the cases.[2] This Court's jurisdiction rests on 28 U.S.C. 1252.

QUESTIONS PRESENTED[3]

1. Whether Section 1611(f) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by preventing otherwise eligible persons from receiving Supplemental Security Income benefits for months spent outside the United States and by suspending payment of such benefits to otherwise eligible persons who have remained outside the country for more than 30 consecutive days, until such persons return to the United States and stay within the country for 30 consecutive days.

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Supplemental Security Income benefits under a statutory section held unconstitutional.

3. Whether the district court properly awarded monetary relief to only those members of the plaintiff class who are "currently needy."

[1] "J.S. App." refers to the appendix to the jurisdictional statement in No. 77-991.

[2] By agreement between the parties, this opening brief addresses the issues in both cases.

[3] We have deleted from the Questions Presented one of the questions framed in the jurisdictional statement. See note 6, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 1611(f) of the Social Security Act, as added, 86 Stat. 1468, 42 U.S.C. (Supp. V) 1382(f), provides:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for [Supplemental Security Income benefits] * * * for any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this title with respect to any month during all of which such person is outside the United States). For pur-

poses of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Section 1631(b) of the Social Security Act, as added, 86 Stat. 1476, and amended, 42 U.S.C. (Supp. V) 1383(b), provides in pertinent part:

> Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from or payment to such individual or his eligible spouse (or by recovery from the estate of either).

Section 1631(c)(3) of the Social Security Act, as added, 86 Stat. 1476, and amended, 42 U.S.C. (Supp. V) 1383(c)(3), provides:

> The final determination of the Secretary after a hearing [on eligibility for or the amount of Supplemental Security Income benefits] * * * shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Section 205(g) of the Social Security Act, as added, 53 Stat. 1370, and amended, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. * * * The court shall have power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *.

STATEMENT

1. The program of Supplemental Security Income ("SSI") for the Aged, Blind, and Disabled, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.*, was enacted to replace several cooperative federal-state programs with a single, uniform system of welfare benefits administered by the Secretary of Health, Education, and Welfare. The new program guarantees a monthly income to persons who meet federally prescribed income levels and other eligibility criteria.

Section 1614(a)(1)(B) of the Social Security Act, 42 U.S.C. (Supp. V) 1382c(a)(1)(B), restricts eligibility for SSI benefits to residents of the United States. Section 1611(f) of the Act, 42 U.S.C. (Supp.

V) 1382(f), provides that no person shall receive SSI benefits for any month during all of which he is outside the United States. Section 1611(f) further provides that "after an individual has been outside the United States for any period of 30 consecutive days he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days."

2. Grace Aznavorian left the United States to go to Guadalajara, Mexico, on July 21, 1974. When she left the United States, she was receiving SSI benefits. While in Mexico, Aznavorian became ill and was unable to return to the United States until September 1, 1974. Under the 30-day rule of Section 1611(f),[4] the Secretary of Health, Education, and Welfare, did not pay Aznavorian SSI benefits for the months of August and September 1974 (J.S. App. 2A-3A).

Aznavorian sought reconsideration, and the Secretary adhered to his decision. A hearing was then conducted at Aznavorian's request. The hearing examiner found that under Section 1611(f) Aznavorian was ineligible for SSI benefits during August and September 1974. The Appeals Council agreed. After

[4] We use the term "30-day rule" as a shorthand reference to the provisions of Section 1611(f). The rule does not always depend on 30 days' absence, however, because the first sentence of that section precludes payment of SSI benefits for any month during all of which an otherwise eligible recipient is outside the United States. Thus, a person abroad for the entire month of February could not receive SSI benefits for that month, even if he or she returned to the United States before being absent for 30 consecutive days.

thus exhausting her administrative remedies, Aznavorian filed this action challenging the constitutionality of the 30-day rule of Section 1611(f). The district court's jurisdiction was invoked under Sections 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 42 U.S.C. (Supp. V) 1383(c)(3). Aznavorian sought relief for herself and all persons similarly situated. She moved for class certification, and the Secretary moved for summary judgment (J.S. App. 1A, 3A-4A).

The district court issued an opinion (J.S. App. 1A-33A) and order (*id.* at 34A-38A) certifying Aznavorian's suit as a class action[5] and granting summary judgment against the Secretary. The court reasoned that, because "[t]he right to travel beyond the frontiers of the United States is a basic constitutional right" (*id.* at 12A), any statute that could affect the exercise of that right must "be measured against a test more exacting than the 'rational basis' standard" (*id.* at 13A). The court selected a "middle ground or middle standard" (*id.* at 15A) from cases dealing with sex discrimination, and it held that the statute does not bear "a fair and substantial relation-

[5] The certified class was defined as (J.S. App. 34A-35A):

> All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. § 1382(f) and regulations promulgated thereunder, from September 26, 1975 until the entry of this Order.

ship in fact to the governmental purposes it seeks to achieve" (*id.* at 16A) because, under this "middle standard," "administrative convenience is not a substantial enough reason to justify penalizing the basic constitutional right to international travel" (*id.* at 17A). In the court's view, the Constitution does not allow SSI eligibility to be suspended solely on the basis of a lengthy absence from the United States, but rather requires individual determination of residence based on "objective factors, such as continued ownership or rental of a home" (*id.* at 19A).

The court also concluded that class actions are permissible under Section 205(g) of the Social Security Act, as incorporated in Section 1631(c)(3), when every member of the class has presented a claim for benefits to the Secretary and the Secretary has decided the case adversely to each member (J.S. App. 4A-7A). It concluded that the requirements of Fed. R. Civ. P. 23 were met in this case (*id.* at 7A-10A) and certified the class accordingly.[6] In light of its

[6] We argued in *Norton* v. *Mathews*, 427 U.S. 524, that, in light of the limitations on judicial review created by Sections 205(g) and (h) of the Social Security Act, 42 U.S.C. 405(g) and (h), district courts may resolve only the contentions of the person or persons who seek judicial review of the Secretary's decision in their case or cases and may not issue injunctions or grant relief to a class of potential beneficiaries. The Court stated that our arguments raised "difficult and perhaps close" problems (427 U.S. at 530), but it did not pass on our contentions in light of its decision that the statute in question is constitutional. Our jurisdictional statement in this case presented the question "Whether a class action may be maintained under Section 205(g) of the Social Security Act"

decision that Section 1611(f) is unconstitutional, the court ordered the Secretary to provide notice of its

(J.S. 4), thereby raising once more the issues not resolved in *Norton*.

We have elected not to ask the Court to decide those issues in this case. Although we adhere to the position that neither class actions nor injunctive remedies are authorized in Social Security cases (cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8), we believe that several considerations make this case an inappropriate one for definitive resolution of the issues by this Court.

First, Aznavorian conceded in the district court that the only jurisdictional basis for this action is Section 205(g) (see J.S. App. 1A). Other courts, however, have held that whether or not Social Security class actions and injunctive relief are proper under Section 205(g), they are proper under 28 U.S.C. 1361. See, *e.g.*, *Elliott* v. *Weinberger*, 564 F.2d 1219 (C.A. 9), petition for a writ of certiorari pending *sub nom. Califano* v. *Elliott*, No. 77-1511. Because Section 1361 was not considered by the district court, this Court could not finally decide whether district courts may award injunctive or class relief in Social Security cases. It could reach that question, however, in *Elliott*, and we believe that it should do so in that case.

Second, the district court deemed "waived" our objection to the nationwide scope of the class (J.S. App. 10A). It probably was right to do so, because our belated objection had been put in terms of venue. Our more general argument, made in *Elliott* and in *Califano* v. *Mandley*, No. 76-1416, argued November 30, 1977 (with *Quern* v. *Mandley*, No. 76-1159), is that certification of a nationwide class cuts short judicial consideration of a legal issue and may require premature decision by this Court of issues that should be allowed to percolate in the lower courts. See *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n. 26. The Court could consider that argument in *Elliott* but not in the present case.

Third, every member of the class certified in the present case meets the requirements of Section 205(g). The class includes only persons who have presented a claim to the Sec-

decision to all members of the class who were receiving SSI benefits on the date of the court's order or

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retary and with respect to whom the Secretary made an adverse decision not more than 60 days before the suit was filed (J.S. App. 34A-35A). Moreover, the district court did not issue an injunction; it instead entered only a declaratory judgment that would have little more effect than the *stare decisis* consequences of a decision that simply ordered the Secretary to pay benefits to a single claimant. Other courts have issued class-wide injunctions or have defined classes that include persons whose claims would not independently meet the requirements of Section 205(g). See, *e.g.*, *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333 (C.A. 3); *Johnson* v. *Mathews*, 539 F.2d 1111 (C.A. 8); *Jiminez* v. *Weinberger*, 523 F.2d 689 (C.A. 7), certiorari denied, 427 U.S. 912. *Elliott* involves both an injunction and a class containing persons who could not independently satisfy the requirements of Section 205(g), and consideration of that case thus would allow the Court to have before it the full range of arguments concerning class and injunctive relief.

Our decision not to press the class action question does not leave the problem of this Court's jurisdiction unaddressed. Here, as in *Salfi*, at least one person (Aznavorian) met the jurisdictional requirements of Section 205(g) no matter what the proper status of the class action may be. The Court therefore is free to consider all of the arguments made in this brief. Moreover, this Court's decision will have a *stare decisis* effect that could make further consideration of the class action standards unnecessary; if the Court should hold that Section 1611(f) is constitutional, the extent of the class would be irrelevant, and if the Court should hold that the statute is unconstitutional, the Secretary would give that decision immediate nationwide effect whether or not a class had been certified. Cf. *Philbrook* v. *Glodgett*, 421 U.S. 707, 720-722. We, of course, stand ready, nevertheless, to brief the class action issue if the Court so requests. (The Court also could refer to our brief in *Norton* for a presentation of our arguments if the Court believes them pertinent to its decision. A copy of that brief has been furnished to opposing counsel.)

who would then have been receiving benefits had it not been for Section 1611(f).[7]

The court held that payment of retroactive benefits to class members would not violate principles of sovereign immunity if it were to limit relief to persons who are "currently needy" (J.S. App. 28A-31A). So limiting the obligation to pay retroactive benefits, the court ordered the Secretary to pay benefits to Aznavorian and other members of the notified class whose benefits had been suspended because of the 30-day rule but who in fact had continued to be residents of the United States.

On February 21, 1978, the district court entered an order partially staying its judgment pending this Court's decision (A.). The court relieved the Secretary of the immediate obligation to notify designated class members of the Court's decision and to

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[7] We have argued, in a memorandum filed at the Court's request in *Randle* v. *Beal*, petition for a writ of certiorari pending, No. 76-6853, that the requirement of notification of a class of persons whose benefits were (in the past) affected by an unconstitutional social welfare statute offends the Eleventh Amendment. Similar reasoning would lead to the conclusion that the notice requirement here is improper under sovereign immunity principles. The Eleventh Amendment question is before the Court in *Jordan* v. *Trainor*, 563 F.2d 873 (C.A. 7) (*en banc*), certiorari granted *sub nom. Quern* v. *Jordan*, February 27, 1978 (No. 77-841). We have elected, however, not to present in this case any question concerning the authority of the district court to order that notice be given. (The notice question would be important, of course, only if the Court were to hold that the district court properly required the payment of retroactive benefits.)

pay retroactive benefits. The court did not, however, stay the declaratory portions of its judgment or the directive to pay retroactive benefits to Aznavorian. Accordingly, the Secretary has paid Aznavorian the benefits she would have received during August and September 1974, had it not been for Section 1611(f).

SUMMARY OF ARGUMENT

I

Section 1611(f) is rationally related to a legitimate governmental purpose and does not violate the Due Process Clause of the Fifth Amendment. This Court has repeatedly upheld statutory classifications in social welfare programs as long as they satisfy the "rational basis" test. The Court has followed this rule even where a challenged legislative judgment may incidentally affect a constitutionally protected right. *Califano* v. *Jobst*, No. 76-860, decided November 8, 1977 (possible incidental effect of Social Security classification on recipients' fundamental right to marry). Under the analysis of *Jobst*, the 30-day rule also should be sustained if it is supported by a rational basis.

The right to travel abroad is not a "fundamental" right. It is "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment" and "[a]s such * * * can be regulated within the bounds of due process." *Califano* v. *Gautier Torres*, No. 77-88, decided February 27, 1978, slip op. 3 n. 6. Section 1611(f) has no more than an

incidental effect on the exercise of that constitutional liberty; the statute has no effect whatever on trips abroad that last less than 30 days, and it does not prohibit foreign travel of any duration.

The 30-day rule of Section 1611(f) complements the United States residence requirement for SSI eligibility. It serves as an important administrative aid in ensuring that SSI benefits are paid only to United States residents. Section 1611(f) avoids the necessity for individualized determinations of recipients' intent when they leave the country for extended periods and thus helps to reduce the cost and complexity of SSI administration.

The statute also contributes to the congressional goal of making certain that SSI benefits, calculated on the basis of the United States cost of living, are used to support persons who actually need the money to live in the United States. Section 1611(f) eases the burden of eligibility redeterminations by compelling recipients to be in the vicinity of Social Security Administration offices at least once each month. At the same time, the 30-day rule lessens the possibility of fraud by helping the SSA ascertain whether SSI benefits are being used for the support of their intended recipients. Section 1611(f) therefore bears a rational relation to several legitimate governmental purposes.

II

The United States has not waived its sovereign immunity with respect to recoveries of money as an accrued liability for action taken in the past in reli-

ance on an unconstitutional statute. To the extent Congress has spoken on the subject, it has prohibited payments by enacting Section 1611(f). The district court therefore erred in awarding retroactive monetary relief to SSI recipients who had been denied benefits through the operation of Section 1611(f).

Neither Section 205(g) nor Section 1631(b) of the Social Security Act authorizes recovery against the government on claims alleging that benefits were denied in accordance with an unconstitutional statutory provision. Section 205(g) is merely a grant of jurisdiction, and Section 1631(b) only authorizes payment of benefits to which a claimant was statutorily entitled. Aznavorian and her class admittedly were not entitled to benefits under the Act because of Section 1611(f), and they therefore cannot receive retroactive payments.

III

If this Court should conclude that the district court properly granted retroactive relief, it also should affirm the district court's decision to limit that relief to "currently needy" class members. The district court correctly reasoned that the SSI program is intended to aid the needy and that, therefore, an award of retroactive benefits to persons not in need on the date of the court's order would not advance the legislature's purpose in establishing the program. As argued above, Section 1631(b) of the Social Security Act does not authorize the award of retroactive monetary relief on claims like that presented here. *A fortiori*, it does not require such relief. In the absence of a statutorily prescribed remedy, the district court was free to exercise its equitable discretion in determining appropriate relief. See, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-331. The court's exercise of that discretion was proper and should be sustained.

ARGUMENT

I

THE THIRTY-DAY RULE OF SECTION 1611(f) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. Section 1611(f) is constitutional if it bears a rational relation to a legitimate legislative purpose.

In determining whether particular classifications in social welfare laws satisfy the requirements of due process and equal protection, this Court consistently has held that the Constitution is satisfied if there is a rational basis for the legislature's choice. See, *e.g.*, *Cleland* v. *National College of Business*, No. 77-716, decided March 20, 1978; *Califano* v. *Gautier Torres*, No. 77-88, decided February 27, 1978; *Califano* v. *Jobst*, No. 76-860, decided November 8, 1977; *Mathews* v. *De Castro*, 429 U.S. 181; *Mathews* v. *Diaz*, 426 U.S. 67; *Weinberger* v. *Salfi*, 422 U.S. 749; *Jefferson* v. *Hackney*, 406 U.S. 535; *Richardson* v. *Belcher*, 404 U.S. 78; *Dandridge* v. *Williams*, 397 U.S. 471. Laws providing for governmental payments of monetary benefits are "entitled to a strong presumption of constitutionality" (*Mathews* v. *De Cas-*

tro, supra, 429 U.S. at 185), and legislative "efforts to tackle the problems of the poor and needy" will be sustained as long as the legislature's judgments are "rational, and not invidious" (*Jefferson* v. *Hackney*, *supra*, 406 U.S. at 546).

The district court reasoned, however, that Section 1611(f) must be scrutinized more closely than other statutory classifications because it could affect SSI recipients' decisions to travel abroad (J.S. App. 12A-16A). The court thought that some "middle standard" of review was appropriate and that the 30-day rule could be upheld only if it bore a "fair and substantial relationship" to a legitimate governmental purpose (*id.* at 16A-20A). But no decision of this Court holds that a special standard of review should be applied when a statutory provision potentially affects international travel.

Califano v. *Gautier Torres*, *supra*, stated that the "right" of international travel is "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment" and "[a]s such * * * can be regulated within the bounds of due process" (slip op. 3 n. 6). Using language nearly identical to Mr. Justice Stewart's concurring statement in *Shapiro* v. *Thompson*, 394 U.S. 618, 642-643, the Court indicated that different degrees of constitutional protection are afforded to interstate and international travel. The Court repeated its earlier conclusion that "the right of interstate travel is virtually unqualified." See *United States* v. *Guest*, 383 U.S. 745, 757-758; *Shapiro* v. *Thompson*, *supra*, 394 U.S. at 630-

631 and n. 8; *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 254-255 and n. 7.[8] By contrast, the Court said, the right of international travel is subject to regulation. The Court cited three cases, all of which involved constitutional challenges to individual passport denials. See *Kent* v. *Dulles*, 357 U.S. 116; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Zemel* v. *Rusk*, 381 U.S. 1.

Appellees (Mot. to Affirm 4-10 and n. 9) and the district court (J.S. App. 14A-19A) found in those three cases the proposition that the right to international travel is a fundamental or basic right that may not be infringed absent a showing of special strength. As this Court's references to *Kent*, *Aptheker*, and *Zemel* indicate, however, those cases do not stand for that proposition. *Kent* held simply that Congress had not delegated to the Secretary of State the authority to withhold passports to citizens because of their beliefs or associations. *Aptheker* acknowledged the legislature's right to regulate travel abroad and held only that, in indiscriminately denying passports to all members of Communist organizations, the Subversive Activities Control Act swept too broadly and bore only a "tenuous relationship" (378

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[8] As the Court stressed in *United States* v. *Guest*, *supra*, 383 U.S. at 760 n. 17, "the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private. In this connection, it is important to reiterate that the right to travel freely from state to state finds constitutional protection that is quite independent of the Fourteenth Amendment."

U.S. at 514) to the congressional purpose of protecting national security. *Zemel*, too, recognized the right of the legislature to regulate international travel; the Court there upheld the constitutionality of the Passport Act of 1926, as interpreted to authorize the Secretary of State to refuse, for reasons of foreign policy, to validate passports for travel to particular countries. None of these cases indicated that the right to travel abroad is "fundamental" or "basic;" none enunciated a special test for determining when particular foreign travel regulations violate the Due Process Clause.[9]

The district court's unsupported conclusion that foreign travel is a "basic" constitutional right led it to hold that any burden imposed by government on foreign travel must bear a "fair and substantial relationship" to a legitimate governmental purpose. The court avowedly derived this test from opinions of this Court in cases involving explicit gender discrimination. See, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71, 76. Whatever may be the appropriate standard of review in such cases (see *Craig* v. *Boren*, 429 U.S. 190, 210-211 (Powell, J., concurring), 211-213 (Stevens, J., concurring); *Califano* v. *Webster*, 430 U.S. 313, 316-317), the rational basis test remains appropriate here,

[9] The most specific guidance was provided in *Zemel* (381 U.S. at 14): "[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.

The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction" (footnotes omitted).

where the challenged statute is part of a governmental program for the distribution of monetary benefits to the needy and involves no classification based on an accident of birth [10] or directly infringing a constitutionally protected right, fundamental or otherwise.

The 30-day rule does not directly prohibit or regulate foreign travel, and it is therefore unnecessary for the Court to decide how important foreign travel may be in the catalogue of constitutional "liberties." Section 1611(f) is absolutely neutral with respect to international trips lasting less than 30 days,[11] and it does not forbid trips of any duration. The only "penalty" for even the longest trip abroad is simply that the person does not receive social welfare benefits during a period approximately equal to the period of absence; in other words, the statute "places no obstacles—absolute or otherwise" in the path of persons desiring to travel for more than 30 days but simply leaves them "dependent on private sources" (*Maher* v. *Roe*, 432 U.S. 464, 474).[12] To borrow a phrase from *Zemel*, "the extent of the governmental restriction imposed" (381 U.S. at 14) is minimal.

[10] The Court has taken especially close looks at statutes involving such classifications. See, *e.g.*, *Foley* v. *Connelie*, No. 76-839, decided March 22, 1978 (alienage); *Trimble* v. *Gordon*, 430 U.S. 762 (illegitimacy).

[11] The sole exception to this general rule is discussed in note 4, *supra*.

[12] *Maher* held that, even though a woman has a "fundamental" right of privacy that protects her ability to obtain an abortion, the decision of a state not to pay for an abortion would be assessed under the rational basis test.

Moreover, as the Court recently held, classifications in statutes establishing social welfare programs should be reviewed under the "rational basis" test even if they may have an incidental effect on a constitutionally protected right. *Califano* v. *Jobst*, *supra* (possible incidental effect of Social Security classification on recipients' decision to marry).[13] The deterrent to extended international travel of which Aznavorian complains is simply not comparable to the penalties on interstate travel in *Shapiro* v. *Thompson*, *supra*, and *Memorial Hospital* v. *Maricopa County*, *supra*, or to the direct obstacles to international travel challenged in *Aptheker*.

The effect of Section 1611(f) on international travel is not different in kind from the effect of any rule that makes social welfare benefits depend on the residence of the beneficiary. As the Court held in *Gautier Torres*, a person who moves from one place to another has no legitimate claim of entitlement to continue receiving benefits from the place he left behind, no matter how important those benefits may have been and no matter how much the prospect of losing benefits may deter the person from moving. As long as it is conceded—as both Aznavorian (Mot. to Affirm 10-16) and the district court (J.S. App. 16A-18A) concede—that SSI benefits may be made

[13] See also *Maher* v. *Roe*, *supra*; *Zablocki* v. *Redhail*, No. 76-879, decided January 18, 1978, slip op. 13 n. 12 (even though there is a "fundamental" right to marry, provisions in social welfare laws that place "no direct legal obstacle in the path of persons desiring to get married" should be evaluated under the rational basis test); *ibid.* (Stevens, J., concurring).

contingent on actual residence in the United States, then the question of how to separate residents from non-residents inevitably becomes one of line-drawing.

The drawing of any line based on residence will discourage some persons from leaving the country, and any treatment of residence depending (in whole or in part) on the length of absence from the country will discourage trips that would take longer than the period specified by the line-drawer. But the length of absence from the country plainly has some bearing on residence: the longer a beneficiary is out of the country, the more reasonable it becomes to think that the beneficiary is not going to return. What is more, the longer the beneficiary is out of the country, the less reasonable it becomes to pay continuing benefits that are based on a supposed need for subsistence in the United States. If length of absence from the country is relevant to the decision to pay benefits, then this case involves only a legislative choice about how long to continue paying money to persons who have left the country and who may or may not return. It is thus a classic case of a policy judgment that should be sustained if it is rationally related to a legitimate legislative purpose.

B. The 30-day rule is rationally related to legitimate governmental purposes.

1. Restricting eligibility for SSI benefits to United States residents.

Both the district court and Aznavorian concede that Congress may limit SSI benefits to permanent residents of the United States (J.S. App. 16A-18A; Mot.

to Affirm 10-16). This Court's decision in *Gautier Torres* indicates that these concessions were well advised. We submit that Section 1611(f) is rationally related to this concededly legitimate purpose.

Congress intended the 30-day rule to be one means of implementing the residence requirement. That requirement is imposed directly by Section 1614(a)(1)(B) of the Social Security Act, 42 U.S.C. (Supp. V) 1382c(a)(1)(B), and implemented in part by the 30-day rule of Section 1611(f). Sections 1611(f) and 1614(a)(1)(B) were discussed together in a single paragraph in both the House and Senate committee reports on the Social Security Amendments of 1972. See H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 149 (1971); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 385 (1972).

The 30-day rule is well suited to the primary legislative purpose it serves. It is an administratively simple demarcation line. Without the 30-day rule or some equally simple (and therefore, on occasion, equally arbitrary) test, the Social Security Administration ("SSA") would be faced with the formidable task of determining whether each SSI recipient who leaves the United States is abandoning his residence here or is only leaving for a temporary visit or vacation. The district court's suggestion that the SSA determine subjective intent to remain abroad from available objective criteria [14] would entail both substantial

[14] The district court listed home ownership or rental, continued employment, and membership in organizations as possible factors to be considered. J.S. App. 19A.

expense and an inevitable potential for the sort of mistake that besets case-by-case adjudication.

Congress could reasonably conclude that most SSI recipients who intend to leave the country temporarily and maintain their residence here will return within 30 days. After all, SSI recipients are not wealthy and receive most or all of their income from social welfare programs. They are unlikely to take lengthy tours abroad, and absence for more than 30 days thus has a greater significance than it might for persons of more substantial means. An individualized determination of the subjective intent of SSI recipients who leave the country for extended periods, moreover, would entail significant additional administrative obligations and expense and would thus diminish the resources available to provide the basic SSI benefits at current levels. Some easily administrable method of restricting benefits to United States residents is a practical necessity if Congress' purpose is to be achieved. Cf. *Weinberger* v. *Salfi*, *supra* (upholding rule making benefits depend on duration of marriage, even though inquiry using subjective intent and other factors might be more reliable).

The portion of Section 1611(f) that prohibits restoration of SSI benefits to an otherwise eligible person who has travelled outside the United States for 30 or more consecutive days until that person has returned to the United States and remained here for at least 30 consecutive days also is rationally related to the legitimate purpose of ensuring that SSI recipients are United States residents. This provision

avoids the anomalous situation in which an otherwise eligible person could stay outside the United States for extended periods of time and nevertheless receive an SSI check immediately on each return to the country, thereby circumventing the residence requirement. It also avoids unequal treatment of persons who travel abroad for extended periods that include a full calendar month, on the one hand, and persons who remain outside the country for more than 30 consecutive days but arrange to leave the United States in one month and return before the end of the next, on the other. In short, the statutory scheme offers a fair and simple means for evaluating whether a given person is a continuing, full-time resident of the United States.

2. Limiting benefits to those who need them for subsistence in the United States.

SSI benefits are intended to help needy persons who are unable to meet from their own resources the cost of living in the United States. Benefits are calculated on the basis of the United States' cost of living. The rules barring payment of SSI benefits for months spent entirely outside the country and suspending SSI benefits after a recipient has been absent from the country for 30 consecutive days prevent recipients from obtaining "windfall" benefits while making extended visits to areas where the cost of living is less than it is in the United States.

Indeed, the application of a 30-day rule to recipients of benefits based on need may also serve to reinforce the need requirement. Because international

travel is costly, an extended trip abroad logically indicates one of three things: (1) the beneficiary has substantial resources in addition to SSI benefits and so may not need the benefits; (2) the beneficiary is staying with friends or relatives abroad and so does not need benefits that were computed on the costs of maintaining an independent household in the United States; or (3) the beneficiary is taking up residence outside the United States. If any of these possibilities is true—and one will be true in the great majority of cases—there is rational support for a decision to suspend benefits during the period of absence.

There is, moreover, no principled reason why Congress must pay benefits to all persons who may be called "residents" of the United States. Take, for example, a person with relatives in Canada who spends nine months of each year in the United States and three months staying with his Canadian relatives. Congress could rationally conclude that this person should receive benefits only for the portion of the year he resides in the United States. This would leave to Canada the decision whether the person should receive social welfare benefits for the period of his Canadian residence. In other words, the world need not be divided, either by statute or by principles of constitutional law, into categories of residents (who receive continuous benefits) and non-residents (who receive no benefits). There are many people who are best seen as part-time residents, and Section 1611(f) results in the receipt by part-time residents of the United States of benefits reasonably closely matched

to the proportion of time that these persons reside in the United States.

Section 1611(f) also reduces the SSA's administrative burden by eliminating the need to monitor and verify the continuing eligibility of persons who are travelling outside the United States.[15] Concomitantly, the 30-day rule reduces the possibility of fraud by requiring actual physical presence within reasonable proximity of a SSA office and thus enabling administrators to ensure that SSI benefits reach their intended recipients.

For all these reasons, Section 1611(f) should be upheld as a rational exercise of congressional power in the social welfare area.

We do not contend that the 30-day rule is a perfect method of preventing non-residents from receiving SSI benefits. We do not even contend that it is the best method available for accomplishing that objective. But enforcing the residence rule is not the statute's only objective; it therefore is not surprising that it produces less than perfect results when measured by that yardstick. However that may be, a statutory social welfare classification "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge*

[15] The eligibility criteria for SSI benefits are set forth in Sections 1611, 1612, and 1613 of the Act, 42 U.S.C. (Supp. V) 1382, 1382a, and 1382b. These statutory provisions are supplemented by the Secretary's regulations, 20 C.F.R. 416.1101 *et seq.*, 416.1201 *et seq.*

v. *Williams*, 397 U.S. 471, 478. The Constitution does not require individual decisions that take into account all factors that might ideally be relevant to a decision to pay benefits. Broad and administratively convenient rules of eligibility, such as the 30-day rule, are permissible unless they bear no relationship to reality. *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 773-780.[16] See also *Cleland* v. *National College of Business*, *supra*; *Califano* v. *Jobst*, *supra*; *Mathews* v. *De Castro*, *supra*; *Mathews* v. *Diaz*, *supra*.

The congressional choice to eschew, in the interest of administrative convenience, individualized determinations of the residence of SSI recipients who travel abroad for more than 30 days is not arbitrary. That choice should be upheld as a reasonable means of limiting SSI payments to persons who live in the United States and of accomplishing the other legitimate legislative purposes discussed above.

[16] The Court stated in *Salfi* (422 U.S. at 777):

> [T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions * * *. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.

II

RETROACTIVE MONETARY RELIEF IS BARRED BY SOVEREIGN IMMUNITY

If the Court should disagree with our submission that Section 1611(f) is constitutional, it then would be required to consider whether the district court was authorized to order the government to pay money to persons harmed by the operation of the statute. For the reasons that follow, we submit that it was not.

This Court has held that monetary relief for past harms is not available against the United States unless Congress has specifically determined that such relief is appropriate, *i.e.*, unless Congress has waived the government's sovereign immunity. *United States* v. *Testan*, 424 U.S. 392. Congress has not authorized the payment of money to Aznavorian or the class certified by the district court. To the contrary, Congress, by enacting Section 1611(f), explicitly *prohibited* the payment of money. If the Court should hold that Section 1611(f) is unconstitutional, that would remove the prohibition, but it would not create a statutory authorization for retroactive payments. Such an award would be permissible only if some other provision of the statute authorized it. None of the provisions relied on by Aznavorian and the district court authorizes retroactive relief. Like the Tucker Act provision reviewed in *Testan*, Section 205(g) of the Social Security Act merely grants the federal courts jurisdiction to hear certain cases; it does not create a substantive right to a monetary remedy whenever the government withholds benefits

in accordance with a stautory provision later held unconstitutional. See *DeLao* v. *Califano*, 560 F.2d 1384, 1389-1391 (C.A. 9); *Tatum* v. *Mathews*, 541 F.2d 161, 165-166 (C.A. 6); *Johnson* v. *Mathews*, 539 F.2d 1111, 1122-1125 (C.A. 8).

Nor may any other provision of the Social Security Act " 'fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*United States* v. *Testan*, *supra*, 424 U.S. at 400).[17] It would be hard to argue that the Act, which in Section 1611(f) explicitly forbids payments, simultaneously authorizes them. There is no provision stating that, if a portion of the statute prohibiting payment is declared invalid, then payment is deemed authorized. The closest thing to such a provision is Section 1631(b) of the Act, 42 U.S.C. (Supp. V) 1383(b), which directs the Secretary to make retroactive payments to persons wrongfully denied benefits to which they were statutorily entitled.

There is a critical distinction, however, for purposes of Section 1631(b), between administrative decisions that comported with basic statutory rules and decisions that violated the statute. If the Secretary should misinterpret or misapply the statute, Section 1631(b) authorizes a court to order the Secretary to pay retroactive benefits. That judicial order carries out the statutory plan and corrects the Secretary's error. It requires the payment of benefits that

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[17] The Due Process Clause itself is not a waiver of sovereign immunity. See *Duarte* v. *United States*, 532 F.2d 850, 852 (C.A. 2).

Congress itself wanted to be paid. Here, however, the Secretary acted in accordance with Congress' plan; this case does not involve an order to the Secretary to pay benefits that Congress wanted to be paid. Aznavorian received the "correct amount of benefits" within the meaning of Section 1631(b), and no relief is required by that statute. In other words, Section 1631(b) creates a remedy for an administrative violation of the statute but not for a deficiency in the statutory plan itself. This Court has repeatedly stated that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4; *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Sherwood*, 312 U.S. 584, 586; *Soriano* v. *United States*, 352 U.S. 270, 276. In light of this general principle, Section 1631(b) should not be construed to authorize retroactive payments to persons to whom the statute explicitly denies benefits.

Our position is supported by the very cases that the district court cited (J.S. App. 28A-30A) in support of its contrary holding: *Tatum* v. *Mathews*, *supra*, and *Johnson* v. *Mathews*, *supra*. These cases held that Social Security claimants had been denied procedural due process in connection with the termination of their SSI benefits, but that only claimants found *statutorily* eligible for benefits could obtain retroactive relief under Section 1631(b). Congress simply has not provided for retroactive payments under Section 1631(b) where claimants cannot establish statutory eligibility for such payments. Cf. *Edelman* v.

Jordan, 415 U.S. 651 (distinguishing between the award of an accrued monetary liability for past wrongs and prospective relief with monetary consequences); *Milliken* v. *Bradley*, 433 U.S. 267, 288-290 (same).

To be sure, this Court, without mentioning the sovereign immunity problem, has occasionally approved the payment of benefits as an accrued liability in the course of affirming decisions that had invalidated Social Security provisions on constitutional grounds. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199, affirming 396 F. Supp. 308 (E.D. N.Y.); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, affirming 367 F. Supp. 981 (D. N.J.). Because these cases do not discuss the problem, however, they do not preclude the Court from disapproving retroactive relief now. In recognizing the states' Eleventh Amendment immunity from retroactive monetary relief in *Edelman* v. *Jordan*, *supra*, the Court explicitly departed from four previous cases (including one decided after plenary consideration) that had approved such relief without explicitly considering the Eleventh Amendment problem (415 U.S. at 670-671).[18]

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[18] See also *Stone* v. *Powell*, 428 U.S. 465, 480-481 and nn. 14, 15; *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38; *Webster* v. *Fall*, 266 U.S. 507, 511 ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

III

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN LIMITING MONETARY RELIEF TO CLASS MEMBERS WHO ARE CURRENTLY NEEDY

Should this Court hold the 30-day rule unconstitutional and decide that retroactive class relief may be awarded, it will need to consider the question raised in Aznavorian's appeal, *i.e.*, whether the district court properly limited monetary relief to "currently needy" class members. The district court, invoking its equitable discretion, awarded retroactive relief to only those class members who were receiving SSI benefits on the date of the court's order or who would have been receiving such benefits on that date had it not been for Section 1611(f). The court ruled that only these persons were entitled to receive SSI benefits that had been withheld under the invalidated 30-day rule (J.S. App. 31A, 36A-37A). The district court explained that "[t]he purpose of the SSI program is to help those who are *currently* needy," and that therefore the payment of retroactive benefits to persons not currently needy would not advance the goal of the statutory program (J.S. App. 31A). This was a reasonable exercise of the court's discretion and should not be disturbed.

Aznavorian maintains (No. 77-5999 J.S. 12) that the district court lacked discretion to deny retroactive relief to certain class members, because Section 1631(b) of the Act, 42 U.S.C. (Supp. V) 1383(b), requires the payment of SSI benefits withheld under an unconstitutional statutory provision. We have argued

(see pages 28-30, *supra*) that Section 1631(b) does not even *authorize* the payment of benefits; whether or not we are right in this, the statute certainly does not *require* the payment of benefits to claimants not statutorily eligible to receive them.

Because no statute requires the payment of retroactive benefits, the district court properly could exercise the broad discretion that normally governs the award of equitable remedies. See, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-331. The district court did not abuse its discretion in limiting its remedy to those who are currently needy, and in refusing to burden the Social Security Administration and the taxpayers with the expense of paying SSI benefits to persons who no longer need them and who are not entitled to them under the statute. Cf. *Rothstein* v. *Wyman*, 467 F.2d 226, 235 (C.A. 2), certiorari denied, 411 U.S. 921 (retroactive payments not required to class members improperly denied benefits under the Aid to Families with Dependent Children program).

CONCLUSION

The district court's judgment should be reversed. Should this Court decide that the district court correctly ordered retroactive class relief, the district court's limitation of that remedy to "currently needy" class members should be affirmed.

Respectfully submitted.

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JOSEPH A. CALIFANO, Jr., SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

v.

GRACE AZNAVORIAN, ETC.

GRACE AZNAVORIAN, ETC.,

Appellant,

v.

JOSEPH A. CALIFANO, Jr., SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-991 and 77-5999

JOSEPH A. CALIFANO, Jr., SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

v.

GRACE AZNAVORIAN, ETC.

GRACE AZNAVORIAN, ETC.,

Appellant,

v.

JOSEPH A. CALIFANO, Jr., SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR GRACE AZNAVORIAN, ETC.

OPINION BELOW

The opinion of the district court (J.S. App. 1A-33A)[1] is reported at 440 F.Supp. 788.

[1] "J.S. App." refers to the appendix to the Secretary's jurisdictional statement in No. 77-991.

JURISDICTION

The district court's order was entered on August 23, 1977 (J.S. App. 34A-38A) and its judgment on September 5, 1977. (J.S. App. 39A-40A.) The Secretary's notice of appeal to this Court was filed on September 22, 1977 (J.S. App. 41A) and Aznavorian's notice of cross-appeal was filed on October 4, 1977. (No. 77-5999 J.S. App. 41a-42a.) On March 20, 1978, the Court noted probable jurisdiction on both appeals and consolidated the cases.[2] The Courts jurisdiction rests on 28 U.S.C. § 1252.

QUESTIONS PRESENTED

1. Whether Section 1611(f) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by denying Supplemental Security Income benefits to otherwise eligible recipients and thereby unduly infringing their rights to international travel.

2. Whether sovereign immunity bars recovery of unconstitutionally denied Supplemental Security Income benefits.

3. Whether the district court erred in denying relief to those class members not applying or ineligible for Supplemental Security Income benefits on the date of the class relief order.

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[2]By agreement between the parties, this opening brief addresses the issues on both appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 1611(f) of the Social Security Act, 42 U.S.C. (Supp. V) § 1382(f), provides:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for [Supplemental Security Income benefits] * * * for any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this title with respect to any month during all of which such person is outside the United States). For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Section 1631(b) of the Social Security Act, 42 U.S.C. (Supp. V) § 1383(b), provides in pertinent part:

> Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in fugure payments to such individual or by recovery from or payment to such individual or his eligible spouse (or by recovery from the estate of either).

Section 1631(c)(3) of the Social Security Act, 42 U.S.C. (Supp. V) § 1383(c)(3), provides:

> The final determination of the Secretary after a hearing [on eligibility for or the amount of Supplemental Security Income benefits] * * * shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. * * * * The court shall have power to enter * * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *.

STATEMENT

The Supplemental Security Income Program

Like millions of the nation's aged, blind and disabled poor, Grace Aznavorian depends for her basic necessities of life on the benefits she receives under the Supplemental Security Income program ("SSI"). Social Security Act ("Act"),

Section 1601 *et seq.*, 42 U.S.C. § 1381 *et seq.* On January 1, 1974, the SSI program replaced several welfare programs for the aged, blind and disabled, which were jointly funded by the federal and state governments and administered by the states. These programs contained differing eligibility requirements and widely varying benefit levels. H.R. Rep. No. 231, 92 Cong., 1st Sess. 147, 150 (1971). SSI created a single system of guaranteed minimum monthly payments to these people under uniform federal eligibility requirements administered by the Secretary of Health, Education and Welfare.

To be eligible for SSI, an individual must be 65 years old, or met the statutory definitions of blindness or disability (§ 1614(a), 42 U.S.C. § 1382c(a)), and be poor as defined by standards in the SSI statutes and the Secretary's regulations. Section 1612, 42 U.S.C. § 1382a (income); Section 1613, 42 U.S.C. § 1382b (resources); 20 C.F.R. §§ 416.1101-.1190. In general, an individual must have a monthly income less than the SSI grant and can have no more than $1,500 in resources. A recipient must also be a resident of the United States. Section 1614(a)(1)(B), 42 U.S.C. § 1382c(a)(1)(B).

An eligible person receives a monthly benefit from the SSI program (§ 1611(b)(1), 42 U.S.C. § 1382(b)(1)), which is periodically adjusted upward with the cost of living in conjunction with raises in Title II (Social Security) benefits. Section 1617, 42 U.S.C. § 1382f. Currently the federal monthly grant is $189.40. Social Security Claims Manual ("CM") § 13127.

Mrs. Aznavorian began receiving SSI disability benefits in January, 1974. Her monthly grant was $146.00 (§ 1611(b)(1), 42 U.S.C. § 1382(b)(1)) and was her sole source of support. (Appendix ("A") 12, 22.)

The Operation of Section 1611(f)

With 8 million other Americans (1975 *Annual Report,* Immigration and Nationalization Service 32), Mrs. Aznavorian made a trip abroad in 1974. On July 24, she left her home in San Diego for Guadalajara, Mexico to obtain medical treatment. At the time of her departure, she did not intend to spend more than a month in Mexico. She became ill in Guadalajara and was unable to return to the United States until September 1, 1974. Consequently, she was out of the country for 38 consecutive days. She never intended to abandon her United States residence. (J.S. App. 2A-3A.)

Because she remained outside the United States from July 25 to September 1, the Secretary did not pay her SSI benefits for August and September 1974 pursuant to the provisions of § 1611(f). (J.S. App. 3A.) That section conclusively presumed that Mrs. Aznavorian had abandoned her residence in the United States when she remained outside the country for the calendar month of August. Because she was away for 30 consecutive days[3], it also conclusively presumed that she could not reacquire her residence for the first 30 days following her return to San Diego. Literally, § 1611(f) states that she is "treated as remaining *outside* the United States until . . . [she] . . . has been *in* the United States for a period of 30 consecutive days." (emphasis added). She consequently lost her sole source of income for a two month period.

Anna Tolstick was born in Galicia, Russia in 1896. (R. 341-344.) She came to the United States in 1921 and had four children here. In 1976, at the age of 79, 55 years after leaving Russia, she wanted to visit her one living sister

[3]Hereafter, when we refer to both the "calendar month" and the "30 consecutive days," we use the term "month."

in Ukraine, U.S.S.R. and her homeland for a last time before she died. She believed that her trip would take two months. Because she was an SSI recipient, she inquired at her local Social Security office about receiving her benefits during the trip. She was advised that she would in fact lose three months of benefits if she took the planned two month trip. For that reason, she has not made the journey.

Bestabe Rivas was born in Cali, Colombia in 1895. (R. 345-349.) In 1963 she immigrated to the United States where all but one of her children live. Like Mrs. Tolstick, at 81 she wanted to visit her daughter and grandchildren and her homeland once before she died. Her inquiry at the local Social Security office met with the response that she would forfeit three months of SSI benefits if she made the two month trip. To avoid the consequences of such a loss, she gave up her planned trip.

To many Americans foreign travel is important. It is hardly surprising that many residents in this land of immigrants want to maintain or revive family ties, search for their roots or do the myriad other things which tie this country's people to the rest of the world. It is even more crucial for many SSI recipients. The intensity of desire for such travel is typical of persons of advancing age. *See* Laxalt, *Sweet Promised Land* (1957). Travel for SSI recipients is certainly not easy: they must save, often for a long time, travel by the cheapest means of transportation, and live frugally. Yet the purposes make the effort worthwhile.

Section 1611(f) makes such trips practically impossible for people in the precarious circumstances of the aged, blind and disabled poor who must rely on SSI to avoid poverty. By denying SSI for taking any journey lasting a month, many, like Tolstick and Rivas, do not travel because they cannot afford to lose their SSI: they must continue to pay certain

fixed expenses in the United States like rent and utilities. Given the special vulnerability of their age and disability, they need the shelter and security of their home immediately on their return. (R. 342, 346.) Others, like Mrs. Aznavorian now, will not even venture on a short trip out of fear that an unforseen illness, a missed flight, or any other unpredictable event may delay their return to the United States and cause the forfeiture of their SSI.

A SSI recipient always loses SSI benefits under §1611(f) whenever he travels abroad for a month based on the assumption that he has abandoned his United States residence. It is absolutely irrelevant that while abroad, he maintains his old residence in the United States, pays rent or a mortgage payment, utilities, retains a job or shows any of the other objective indicies of his intent to remain a United States resident. Section 1611(f) conclusively presumes that he has abandoned his United States residence for a trip of a calendar month or longer, and cannot reestablish it without waiting at least 30 days once he returns, whenever his trip lasts 30 consecutive days. The Secretary has no statistics or information to determine whether this provision is substantially or in any manner related to the abandonment or reacquisition of United States residency. (J.S. App. 19A; A 38-39.)

The extent of the penalties under § 1611(f) is often fortuitous. If a recipient makes a trip of 29 days, from January 31 to March 2, two full months of benefits are lost. If instead he leaves the country on July 1, and returns on August 31, a trip of 60 days, he loses one month of benefits. If he is gone for 28 days in February, he loses a month of benefits; if he is gone for 29 in March, he loses none.

Administrative and Judicial Proceedings Below

Mrs. Aznavorian unsuccessfully sought reversal of the Secretary's decision on administrative reconsideration, hearing and Appeals Council review. (A 14-15, 22.) After exhausting her administrative remedies, she filed this action under §§ 205(g) and 1631(c) (42 U.S.C. §§ 405(g) and 1383(c)) on behalf of herself and a nationwide class of similarly affected SSI recipients, to declare § 1611(f) in violation of the due process and equal protection guarantees of the fifth Amendment, reverse the Secretary's decision denying their SSI benefits and to recover those benefits upon proof of continued United States residency at an administrative proceeding. Mrs. Tolstick and Mrs. Rivas moved to intervene in the Aznavorian litigation. (R. 93-113, 311-358.)

The district court found that all the class members individually satisfied the requirements of § 205(g) of the Act (J.S. App. 4A); § 205(g) did not preclude class actions (*id.*, 5A-7A);[4] and the proposed class satisfied the requirements of Federal Rule of Civil Procedure 23(a) and (b)(2). (*Id.*, 7A-10A.) It then certified the following class:

> All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals

[4]The Secretary has expressly waived the issue of whether class actions may be maintained under § 205(g). (Sec. Bf., 8 n.6.) We believe that the Court can decide the remaining issues without determining the class question. Accordingly, we have not briefed the issue here. If the Court requests, we will brief the issue and note that we have addressed it in our Motion to Affirm in No. 77-5999, 17-21. We have cited a few cases approving § 205 class actions. *See, infra*, 65 n.20.)

> Council review, based solely on 42 U.S.C. § 1382(f) and regulations promulgated thereunder from September 26, 1975 until the entry of this Order [August 23, 1977]. (*Id.*, 34A-35A.)

The court denied the intervenors' motions on the ground that they had not yet presented a "claim" to the Secretary for purposes of the non-waivable jurisdictional component of § 205(g). (*Id.*, 10A-11A.)

The district court then held that § 1611(f) violated the due process and equal protection guarantees of the Fifth Amendment. It reasoned that § 1611(f) penalized SSI recipients for exercising their "basic constitutional right" to travel outside the United States by denying them need-based welfare benefits for any trip lasting one calendar month or longer. (J.S. App. 12A-14A.) Given this infringement on the right to international travel, the court ruled that § 1611(f) had to bear a "fair and substantial relationship in fact" to the Secretary's asserted purpose of the statute of limiting SSI to United States residents, relying on the test set out in *Aptheker v. Secretary of State,* 378 U.S. 500, 509 (1964) and *Reed v. Reed,* 404 U.S. 71, 76 (1971).[5] (*Id.*, 15A-16A and n.8.) It ruled that § 1611(f) fell far short of this standard, especially as (1) the Secretary had no evidence whatsoever to demonstrate the required relationship (*id.*, 19A) and (2) there were other administrative means being utilized to accomplish that objective without infringing on the right to travel abroad. (*Id.*, 17A-23A.)[6]

[5]In his statement, the Secretary incorrectly implies that the district court relied solely on *Reed*. (Sec. Bf., 7.)

[6]Again, the Secretary incorrectly suggests that the district court invalidated § 1611(f) on the insufficiency of his administrative convenience rationale alone. (Sec. Bf., 8.)

The district court ordered the Secretary to pay Mrs. Aznavorian her suspended SSI benefits for August and September 1974, based on the undisputed facts in the administrative record that she remained a resident of the United States during her trip to Mexico. (J.S. App. 32A-33A.) It granted relief to all class members who were receiving SSI benefits on the date of its order (August 24, 1977) or would have been receiving them but for the operation of § 1611(f). (*Id.*, 31A-32A.) It reversed the Secretary's administrative decisions of these class members (hereafter "appellee class members") and ordered him to notify them of their right to establish retention of their United States residency by the proper constitutional standards at further administrative proceedings and to pay them benefits if they could do so. (*Id.*, 29A-30A.) The court reasoned that sovereign immunity did not bar this relief because §§ 205(g) and 1631(c) (42 U.S.C. §§ 405(g); 1383(c)) authorized the recovery of wrongfully denied SSI at an administrative hearings.[7]

The court denied any relief to two subclasses of the certified class: (1) individuals eligible for, but not having current applications for SSI on the date of the court's order and (2) individuals no longer eligible for SSI on that date (hereafter collectively "appellant class members"). (J.S. App. 31A-32A.) It reasoned that recovery of wrongfully withheld SSI benefits is limited by statute to "currently needy" persons, and alternatively that it had discretion to fashion such class relief. it then entered its judgment on the foregoing opinion and order. (*Id.*, 39A-40A.)

[7]The district court did not rule that sovereign immunity was inapplicable because the relief was limited to "currently needy" class members as the Secretary states. (Sec. Bf., 11.) The Secretary apparently confuses the sovereign immunity issue with the limitation on class relief question.

On February 28, 1978, the district court partially stayed its judgment pending this Court's decision. (A 56-58.) It relieved the Secretary of his obligation to notify the designated class members, conduct administrative re-determinations on residency and pay benefits to any eligible members.

SUMMARY OF ARGUMENT

I.

Section 1611(f) violates the Due Process Clause of the Fifth Amendment because it unduly interferes with the right of SSI recipients to travel abroad without substantially accomplishing its intended purposes. Americans have always exercised the right to travel abroad free of governmental interference except that justified by the weightiest considerations of national security or foreign policy. This basic liberty stems from its recognition and exercise under the common law and our colonial heritage, and after the ratification of the Constitution. A statute which indirectly burdens or interferes with the exercise of a constitutional right, infringes that right and hence implicates it in a constitutional analysis of the statute. By denying need-based benefits to SSI recipients who rely on them for their basis subsistence, § 1611(f) infringes their constitutional right to travel abroad by deterring and penalizing its exercise.

The standard for reviewing statutes infringing on the right to international travel requires that the restrictions be supported by weightiest governmental interests and cannot

be achieved by means which sweep unnecessarily broadly when others are available. *Kent v. Dulles,* 357 U.S. 116 (1958); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *Zemel v. Rusk,* 381 U.S. 1 (1965). Common to all cases was a clear recognition of the special importance of the right to travel abroad, and counterposed against this crucial aspect of personal freedom were the broad and fundamental interests of the federal government in directing the nation's foreign policy and securing the national defense.

The first sentence of § 1611(f) creates a conclusive presumption of abandonment of United States residency for any trip abroad for a calendar month or more. There is no meaningful legislative history and no administrative experience to support the factual bases of this presumption. Given the financial means and reasons why SSI recipients travel, the factual assumptions are not even supported by common experience. The Secretary has convenient alternatives for determining loss of residency by foreign travel and the presumption does not prevent fraud.

The second sentence of § 1611(f) precludes recipients who have returned from showing that they are United States residents for 30 days. Like the abandonment provision, the factual assumptions of this provision are not supported by any legislative history, administrative or common experience. It is no more administratively convenient than the procedures the Secretary uses to determine United States residency. It doubles the penalties on those who travel abroad for a calendar month, and does not prevent fraud.

The two other claimed purposes of § 1611(f) – preventing recipients from obtaining "windfalls" while traveling abroad and reinforcing the "need" requirements – are not real legislative objectives of that provision. If they were, they are not achieved by the use of the broad and sweeping pre-

sumptions of abandonment and reacquisition of residency found in § 1611(f).

II.

Because § 1611(f) is unconstitutional, the district court properly granted the relief to Mrs. Aznavorian and her appellee class members authorized by §§ 205 and 1631. It reversed the Secretary's unconstitutional SSI denials and remanded recipients' claims for an administrative opportunity to prove they in fact retained their United States residences during their brief trips. Recipients successful at these proceedings may recover their unconstitutionally denied payments under § 1631(b). Sovereign immunity does not bar this relief because courts have been granting it for decades, specifically holding that §§ 205 and 1631 constitute waivers of sovereign immunity. Neither the statutes nor the cases make any exception for the recovery of benefits denied under an unconstitutional provision.

III.

The district court refused all relief to the appellant class members. By the class definition all these class members submitted timely claims for relief in the district court under §§ 205(g) and 1631(c)(3), and were denied their SSI entitlement by virtue of § 1611(f). Appellant class members belong to one of two subclasses: (1) eligible individuals not having current applications for SSI on the date of the district court's final order (August 23, 1977); and (2) individuals no longer eligible for SSI on that date. Together, §§ 205(g) and

1631(b), (c), impose obligations (1) on the district court at least to grant a remand for an administrative rehearing to an individual otherwise eligible for SSI when benefits were illegally denied, and (2) on the Secretary to pay those wrongfully denied benefits to such an individual. By denying relief to these class members, the court effectively imposed on them additional requirements for securing judicial relief and recovery of underpayments pursuant to §§ 205(g) and 1631(b), (c), that are nowhere found in these statutes and indeed conflict with them. Assuming, arguendo, that the district court had some discretion to weigh equities in determining whether to grant appellants relief, refusing all relief was an abuse of discretion.

ARGUMENT

I.

SECTION 1611(f) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY UNDULY INFRINGING SSI RECIPIENTS' RIGHT TO INTERNATIONAL TRAVEL.

The district court ruled that enforcement of § 1611(f) violated the Due Process Clause of the Fifth Amendment by unduly infringing the basic constitutional right to international travel. (J.S. App. 20A.) The Secretary argues that § 1611(f) has no constitutionally relevant impact on the right to international travel (Sec. Bf., 16-21) and thus the provision should be upheld as rationally related to restricting SSI to needy, United States residents. (*Id.*, 21-27).

However, Americans have always exercised the right to foreign travel free of government restrictions except those justified by the weightiest considerations of national security or foreign policy. (Part I.A, *infra.*) Section 1611(f) interferes with that right by deterring and penalizing its exercise. (Part I.B, *infra.*) This Court has recognized the right to travel as a "basic constitutional" liberty, and has carefully scrutinized the nature and need for any governmental infringement on its exercise. (Part I.C, *infra.*) Section 1611(f) contains sweeping presumptions of abandonment of United States residency that are without any factual or rational support; that do not substantially achieve their intended purposes; and that could be more narrowly drawn using existing administrative procedures to avoid unduly infringing SSI recipients' right to travel abroad. (Part I.D., *infra.*)

A. The Right To International Travel Is A Basic Liberty Rooted In Our Nation's History And Traditions.

The right to international travel, like the right to interstate travel, is not explicitly mentioned in the Constitution. Yet, consistent with our common law and colonial heritage, Americans have always exercised the right to travel abroad and return, free of governmental interference except that justified by the weightiest considerations of national security or foreign policy. Thus rooted in the "[n]ation's history and tradition" (*Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977)), the Court has consistently protected this basic liberty under the Fifth Amendment. *See Kent v. Dulles,* 357 U.S. 116, 125-27 (1958); *Aptheker v. Secretary of State,* 378 U.S. 500, 505-06 (1964); *Zemel v. Rusk,* 381 U.S. 1,

14 (1965). The historical bases of the right stem from its recognition and exercise (1) under English common law, (2) the laws of the Colonies, and (3) from the documents and events establishing the nation, and Americans' continued free exercise of the right since ratification of the Constitution.

1. English common law recognized the right of subjects to travel abroad unless the Crown imposed restrictions for weighty national security or foreign policy reasons.

The existence and scope of the right to international travel at English common law is one important basis for determining whether and to what extent it is protected by the Constitution. *See Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Moore v. United States,* 91 U.S. 270; 274 (1875); *see also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

Common law commentators disagreed about whether the King had the right to restrict subjects from leaving the realm during the law's earliest stages of development. *See Note, Passports And Freedom Of Travel: The Conflict Of A Right And A Privilege* (hereafter "*Note, Passports*"), 41 GEO. L.J. 63, 64-65 (1952). What is not disputed is that in this early period of the 11th and 12th centuries, the King's restrictions were directed against the highest ecclesiastical officials growing out of its disputes with the papacy. (*Id.*, 65.) The beginning of the 13th century saw the first formal recognition of the right of subjects to travel abroad in Chapter 42 of the Magna Carta of 1215 wrung from King John at Runnymede:

> It shall be lawful in the future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom and natives of any country

> at war with us, and merchants, who shall be treated as is above provided) to leave the kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy — reserving always allegiance due to us. (Trans. in McKechnie, *Magna Carta, A Commentary On The Great Charter Of King John*) (hereafter "McKechnie") 407-08 (2d ed. 1914).

Chapter 41 guaranteed the right to merchants. After the death of King John in 1216, the new Magna Carta preserved the right for merchants but omitted any reference to other subjects. One English commentator explains the omission as arising out of fear of it abuse by the clergy. *See* McKechnie, 408.

The royal exercise of power to restrict travel abroad, having its origins in the Crown's constitutional controversies with the clergy and barons, gradually evolved into a formal restraint known as the writ of *ne exeat regno*. Upon service of the writ, the prospective traveler had to obtain a license from the Crown to depart. *See* Parker, *Right To Go Abroad: To Have And To Hold A Passport* (hereafter "Parker"), 40 VA. L.REV. 853, 867 (1954). In the early 14th century, the Crown "proclaimed" the right to require all subjects to secure permission to travel abroad. *See Note, Passports,* 68. In 1382 after the Peasants War of the preceding year, a statute was enacted confirming the Crown's right to license departures of the lower classes, but exempting barons and merchants. Except for those persons expected to harm the Crown abroad, licenses were issued. *See Goodman, Passports In Perspective* (hereafter "Goodman"), 45 TEX. L.REV. 221, 224 (1966).)

The exercise of royal power to restrict exit apparently fell into disuse in the 15th and 16th centuries. In 1534, a legal

commentator could report that anyone could leave the kingdom, unless restrained by the writ. *See Note, Passports,* 70; Goodman, 225. While the Crown still issued licenses, instances of restrictions concerned foreign policy matters, for example, prohibiting study at Catholic seminaries. *See Note, Passports,* 69. In 1607, under pressure from Parliament, the 1382 statute requiring royal license for foreign travel was repealed. (*Ibid.*) In 1610, common law lawyers argued that the 1216 Magna Carta provision guaranteeing merchants freedom to travel abroad, should apply to all Englishmen. *See* Parker, 866.

Blackstone's *Commentaries*, which are "accepted as the most satisfactory exposition" of the common law since they were familiar to the framers of the Constitution (*Shick v. United States,* 195 U.S. 65, 69 (1904); *Williams v. Fears,* 179 U.S. 270, 274 (1900)), confirms this common law right to travel abroad. Blackstone notes that "personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's inclinations may direct." 1 *Commentaries** 134-37. The common law allowed every man to go abroad ". . . for whatever cause he pleaseth, without obtaining the King's leave" as long as he was not under a royal injunction to stay at home. (*Id.*, *165.) Thus, by the early seventeenth century when English colonists set sail for America, their right to leave and return was both recognized and freely exercised, subject to royal restrictions for reasons of national security or foreign policy.

2. Royal recognition and the colonists' exercise of the right to international travel was crucial in the settlement and growth of the Colonies.

The settlement and growth of the Colonies by the English was accomplished with explicit royal recognition of the right to travel abroad and the colonists' relatively free exercise of that freedom. Formal recognition by the English sovereign and the royal colonial governors both reflected and indeed accelerated the growth and importance of the right to international travel at common law.

Formal royal recognition of the right appeared in the earliest charter for an American colony. Queen Elizabeth's Patent to Sir Humphrey Gilbert in 1578 contained a clause assuring freedom to leave England to anyone who wanted to accompany him. *See Chafee, Three Human Rights In The Constitution of 1787* (hereafter "Chafee") 173 (1956). That clause was inserted in later royal charters, and stands in sharp contrast to the severe restrictions imposed by France and Spain on emigration to their American colonies. (*Id.*, 167-71.) Religious and political loyalty and aristocratic background were basic restrictions on the right to colonize the French and Spanish settlements. England permitted its religious dissenters and lower classes to leave, and never imposed any effective restrictions on travel to the colonies, nor any barriers to entry from other countries. The ease of travel, in large part, explains why the British colonial population grew from about 50,000 in 1650 to 1,850,000 by 1765. *Rossiter, The First American Revolution* (hereafter "Rossiter") 19 (1956).

In America, travel among the Colonies, which functioned as completely autonomous states in relation to each other, flourished without much express legal sanction. *See Chafee,*

177. Indeed, travel among the Colonies and into the western frontier was legally international travel in the colonial period. While the Colonies derived their formal legal charters from the British sovereign, each was legally independent of the other. Moreover, before the Northwest Territory was ceded to England in 1763, travel to trade with the Indians there and to settle was clearly international travel from the Colonies.

Colonial documents also reflected colonists' assertion of right to travel. *See, e.g.*, Massachusetts Body of Liberties of 1641, paragraph 17 quoted at *Note, The Right To Travel And The Loyalty Oath,* 12 COL.J.TRANS.L. 387, 390 (1973). In 1642, colonists forced the royal governor of Maryland to declare:

> . . . the Common right of all inhabitants to depart out of the province at their pleasure unless indebted or obnoxious to justice. (quoted in Goodman, 234.)

Later in the 1660's and 1670's, the Maryland colonial assembly enacted legislation authorizing passes for its residents who wanted to travel to other colonies: the purpose was to facilitate travel by identifying the person to another independent colony rather than to interfere with the freedom. (*Id.*, 235.) When the Dutch in New Amsterdam came under English rule in 1664, one of the rights granted to each resident was the freedom to travel to "England or anyplace." (quoted in Goodman, 236.)

The writ of *ne exeat regno* was used in most colonies, but not as a political device to restrict travel. Instead, it was an equitable proceeding to hold debtors before a court within the borders of a colony (J. Story, *Commentaries On Equity Jurisprudence* 509 (14th ed. 1918)), as it had become in England by the 17th century.

Initially, English mercantile policies dictated that the Colonies be economically subordinate in trading matters: colonies supplied raw materials to England and accepted payment in English manufactured goods. *See* Rossiter, 57-64. As colonial agriculture and manufacturing expanded in the 18th century, this theoretical subordination was replaced by both a belief and practice among the colonists of commercial equality and independence. Restrictive trade laws like the Wollens, Hat and Iron Acts were largely ignored by the colonists. Colonial trade with the French West Indies flagrantly violated the Molasses Act. The English trade restrictions, while generally ignored in practice, provoked colonial resentment. The right to international travel, free of royal restrictions, was an integral part of the settlement of the Colonies, and its restrictions formed one basis for the revolution.

3. An American's right to travel abroad has been an integral strand of the nation's oldest traditions.

The Declaration of Independence, that charter of the American Revolution, was animated by a distinct theory of government having three principal features. (1) All men are created equal and endowed by their creator with certain inalienable rights, including life, liberty and the pursuit of happiness. (2) Governments are instituted to secure these rights, and derive their just powers from the consent of the governed. (3) When a government becomes destructive of those rights, it is the right of the people to alter or abolish it, and to institute a new government based on such principles and powers that seem most likely to ensure their safety and happiness. By 1776, the British government had, according

to the Declaration, violated the rights which the colonists believed were theirs as Englishmen. *See* Rossiter, 7-12, 224-33. Among the specific violations was one that the King "... has endeavored to prevent the population of the States," admittedly with little success.

During the revolution, the Continental Congress tried to limit passes for travel into enemy lines to those issued by the Commander-in-Chief. *See* Goodman, 247. But even then, the purpose was to identify the traveler and not to restrict his travel. As the same time the individual states were issuing their own passports for the same purpose.

The nation's second political charter, the Articles of the Confederation of 1781, contained an express provision in Article IV guaranteeing the right of citizens of one state to travel to and from the others, but no mention was made of the right to travel abroad. The Articles were increasingly condemned for their failure to create an effective national government capable of dealing with matters affecting all states. The constitutional convention was called to remedy those defects. Farrand, *The Framing Of The Constitution Of The United States,* ("Farrand") 42-52 (1913). The debates in the convention of 1787 reveal little relevant on the subject of international travel. No provision was ever offered concerning that right or the right to interstate travel. The absence is attributable to the fact that all citizens could and did travel abroad without government permission or interference. Therefore, the subject was not sufficiently important to engage the delegates' attention. *See* Farrand, 205-06; *Note, Passports,* 71. The same reasons explain the omission in the Bill of Rights ratified seven years later in 1794. Clearly, the long exercise of the right was encompassed within the "liberty" protected by the Fifth Amendment, if the need ever arose. *See* Chafee, 192-93.

During the greater part of our more recent history, the need for a specific guarantee was absent because a citizen's right to travel abroad was generally unrestricted. *See* Passport Office, U.S. Dept. of State, *The United States Passport* (hereafter "*U.S. Passport*") 9 (1976); *Note, Passports,* 72-82; Goodman, 251- 70. Until 1941, restrictions on international travel were imposed during war time by the requirement of obtaining a passport for certain foreign travel. *See Note, Passports,* 72-79. The first general restrictions occurred at the beginning of our involvement in World War II when passports were required for all international travel outside the Western Hemisphere. (*Id.*, 78-79.)

Even a general passport requirement has not curtailed Americans' foreign travel. The number of passports issued has steadily increased over the years; from about 1 million in 1964, to 2.5 million in 1974, to 3.1 million in 1977. *See* Passport Office, *Summary Of Passport Statistics* (hereafter "*Pass. Stats.*") 18 (Jan. 1978). Millions of American citizens travel abroad, and return each year. *See* 1969-1976 *Annual Reports,* Immigration and Nationalization Service (hereafter "INS *Ann. Rep.*") For example, in 1974, the year Grace Aznavorian went to Mexico, more than 8 million other Americans traveled abroad and returned. 1975 INS *Ann. Rep.* 32.

Travelers are of all ages and occupations (*U.S. Passport,* 224-25, Tables 8, 10) and they go abroad for a wide variety of reasons — pleasure, commercial business, personal, religious, education, health and scientific. *See Pass. Stats.*, 12. Indeed, it is not surprising that this nation of immigrants would want to maintain or re-establish ties with family and friends abroad.[8] With the advent of relatively speedy low

[8]This long history of foreign travel free of government restrictions except those dictated by foreign policy and national security is consonant with its recognition in Article 13 of the Universal Declaration of Human *(continued)*

cost commercial transportation, foreign travel has become accessible to everyone. *See, e.g., Time Magazine,* "New Era in the Air, Cheap Fares, Crowded Flights" 50ff. (August 14, 1978).

B. Section 1611(f) Infringes The Basic Constitutional Right To International Travel.

Mrs. Aznavorian was totally dependent on SSI benefits when she made her trip to Mexico for medical treatment. Like millions of other aged, blind and disabled poor, SSI had freed her "from want and the indignities of poverty." *Cardinale v. Mathews*, 399 F. Supp. 1163, 1164 (D.D.C. 1975). It provided her a minimum monthly income, allowed her to retain certain resources, and to save and spend the money as she desired." . . . [P]ayments are made under conditions that are as protective of people's dignity as possible." 20 C.F.R. §416.110(c). She left San Diego on July 24, 1974 intending to return to the country within a month. However, she became ill in Mexico, and could not return to the United States until September 1, 1974. Those few extra days abroad cost her dearly: she forfeited two months of vital SSI benefits by the Secretary's enforcement of §1611(f). The consequences of losing these benefits are obviously so severe that two aged SSI recipients were deterred from returning to their homeland to visit close relatives. Accordingly, the district court found that §1611(f) penalized SSI recipients for traveling abroad so

(footnote continued from preceding page)
Rights, adopted by the General Assembly of the United Nations in 1948. *See* United Nations Dept. of Public Information, S.Doc. 123, 81st. Cong., 1st Sess., 1156. Article 13 provides: "Everyone has the right to leave any country, including his own, and to return to his country."

as to implicate the right in a constitutional evaluation of the statute. (J.S. App. 13A.)

Despite these undeniable consequences, the Secretary claims that §1611(f) has no constitutionally relevant infringement on SSI recipients' right to international travel because: (1) it "does not directly prohibit or regulate" the right (Sec. Bf., 19); and (2) any impact is merely "incidental." (*Id.*, 20.) But neither his test for nor analysis of the impact is correct.

(1) This Court has held that a statute, which only burdens or interferes with the exercise of constitutional rights, infringes those rights, and hence implicates them in a constitutional analysis of the statute. Direct prohibition or regulation is not required.

Durational residency statutes, which deny a "basic necessity of life" such as welfare benefits or nonemergency medical care, have been held to infringe the constitutional right to interstate travel. *Shapiro v. Thompson*, 394 U.S. 618, 628-30 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257-58 (1974). The *Shapiro* majority rejected the dissent's test that statutes which "do not create a flat prohibition" on the right to travel do not infringe the right. (394 U.S. at 650.)[9] In *Memorial Hospital*, the Court most clearly articulated the alternative infringement tests for analyzing indirect restrictions on the right to travel: it determines "whether the waiting period would deter migration . . . [or] . . . the extent to which the residence requirement served to *penalize* the exercise of the right." (415 U.S. at 257) (emphasis in original). It required no showing of actual deterrence; probability was

[9]*See Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) ("Travel is permitted but only at a price [by the denial of the right to vote].").

sufficient. *See Shapiro, supra*, 394 U.S. at 650; *Dunn, supra*, 405 U.S. at 340. And it noted that the denial of a "basic necessity of life," like welfare or nonemergency medical care, has greater impact for the infringement test than the denial of "less essential forms of entitlements." (*Id.*, 259.)

The Court has also found the constitutional right to privacy infringed by a restriction less than a total prohibition or direct regulation. The abortion decision was infringed by limitations on the availability of the means to procure an abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (criminal sanctions on doctors and medical personnel on performing abortions); *see also, Singleton v. Wulff*, 428 U.S. 106, 118 n.7, 121, 122 (1976) (*Wade*, not limited to instances in which the state interdicts the abortion decision). The decision to use contraceptives was unduly burdened by a restriction on their sale to licensed pharmacists. *Carey v. Population Services International*, 431 U.S. 678 (1977).

Maher v. Roe, 432 U.S. 464 (1977) does not change the analysis in these cases, as the Secretary implies. (Sec. Bf., 19.) The Court found that the abortion decision was not infringed by the state's failure to pay for nontherapeutic abortions, while paying for pregnancies. It reasoned that before the state began paying pregnancy related expenses, poor and non-poor women had to rely on private sources for abortion services when making the abortion decision. Thus, its later failure to fund abortions did not interfere with the original basis upon which the abortion decision was made. However, the Court emphatically cautioned that the denial of welfare benefits to otherwise eligible women who obtained abortions:

> would . . . [be] . . . a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under

either the penalty analysis or the analysis we have applied in our previous abortion decisions . . . (432 U.S. at 475 n.8.)

(2) Section 1611(f) infringes SSI recipients' right to international travel (a) by deterring them from taking any trip abroad and (b) by penalizing them for taking any trip lasting a calendar month, 30 consecutive days or longer.

(a) The Secretary argues that §1611(f) is "absolutely neutral with respect to international trips lasting less than 30 days . . ." or a calendar month. (Sec. Bf., 19.) He ignores the statute's obvious deterrent effect on recipients' decisions to take even short trips. Mrs. Aznavorian will certainly think twice before taking another short trip. So will other aged, blind and disabled poor, who have justified fears that an unforeseen illness or any other event beyond their control, will prolong their trip and cause them to lose the benefits on which they rely for their subsistence. Thus, §1611(f) deters many recipients from taking even short trips abroad.

The deterrent effect on decisions to take longer trips is even greater and has been shown in the record. The unfulfilled travel plans of Tolstick and Rivas attest to the utter certainty and dire consequences of losing their SSI benefits for traveling even two months. Any denial of need-based benefits will "deprive an eligible recipient of the very means by which to live . . ." *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). Indeed, the potential effect of any denial of SSI on the aged, blind, and disabled poor, given their greater vulnerability may be more severe than welfare denials on the AFDC recipients in *Shapiro*. In upholding Texas' decision to pay a greater percentage of the needs to aged, blind and disabled poor than to families under the AFDC program, this Court noted that ". . . .it is not

irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them." *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972). In their precarious position, that prospect is indeed so grim, that any loss of benefits makes the price of traveling abroad too high. Like Tolstick and Rivas, many will not go.

(b) The Secretary's analysis of the impact of the benefit denials under §1611(f) is equally incorrect. He assumes that the effect of denying need-based benefits is the same as denying non-need-based benefits. (Sec. Bf., 19.) But since *Goldberg v. Kelly*, this Court has always recognized that the loss of need-based benefits has far more severe consequences on eligible individuals than denials of other government benefits, like Social Security. *See Mathews v. Eldridge*, 424 U.S. 319, 340-42 and n.27 (1976); *Memorial Hospital, supra*, 415 U.S. at 259.

Section 1611(f)'s impact is in certain respects greater than that of the durational residency statutes in *Shapiro* and *Memorial Hospital*. The latter cases involved only applicants for benefits. Section 1611(f) suspends benefits of recipients who have been relying on them for their basic subsistence, often for long periods of time. And it denies them to those least able to scrape together alternative sources of subsistence. *Cf. Jefferson v. Hackney, supra.*

The Secretary suggests that *Califano v. Jobst*, 98 S. Ct. 95 (1977) has carved out an exception to the infringement analysis for "welfare programs." (Sec. Bf., 20.) *Jobst* does not change the law. First, the case did not involve a need-based welfare program, but rather a challenge to statutes terminating Social Security disability benefits received by the child of a deceased wage earner if the child marries a

person ineligible for such benefits. Thus, the Court required a greater impact on the recipient before the termination of benefits could implicate the right to marriage. Second, the Court analyzed the typical marriage situation and concluded that financial independence from parents was a usual consequence:

> . . . Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status . . . [T]here can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried. (98 S. Ct. at 99.)

Thus, since termination of parental support does not normally affect the child's marriage decision, the statutory termination of the benefits on the basis of non-dependency on the parent does not burden the right to marry.

In stark contrast, "tradition and common experience" reveal that trips of more than 30 days do not characteristically signify abandonment of the traveler's residence. Both before and after the enactment of the SSI program, millions of Americans traveled abroad and returned. (*See, supra*, 26.) With the increasingly cheaper and more convenient modes of transportation, foreign travel is practically available to anyone. In this day and age, travel does not "normally mark" the abandonment of residency. Indeed, the Secretary "concedes that he maintains no statistics to substantiate that the one month or 30-day travel period is substantially related in fact to abandonment or establishment of residency." (J.S. App. 19A.)

The threatened or actual denial of SSI to aged, blind and disabled recipients under §1611(f) constitutes a direct, substantial interference with their right to international

travel. Many will never travel abroad. Those who make the journey face the formidable, if not frightening, task of securing their shelter here, as well as travel abroad, without the funds on which they depend for their subsistence needs. For people who are disabled from working or are often too old to do so, the loss of that security is undeniably harsh.[10] Against this background, the district court was clearly correct in concluding that §1611(f) infringes SSI recipients' right to international travel so as to implicate it in any analysis of the constitutionality of that provision.

C. Infringements Of The Right To International Travel Are Closely Scrutinized By This Court.

Government infringements of basic constitutional liberties have consistently faced a careful examination of the interests which the government claims to be protecting, the necessity for the means adopted to advance the interests, and the importance of the disadvantaged liberty. *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (Stevens, J. concurring) (Social Security survivors' benefits denied to widower not receiving one-half support from his wife upon her death); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (government intrusion on choices concerning family living arrangements); *Roe v. Wade*, 410 U.S. 113 (1973) (criminal abortion laws); *Eisenstadt v. Baird*, 405 U.S.

[10]Indeed, it is a far greater burden than complying with the Wisconsin statute invalidated in *Zablocki v. Redhail*, 98 S. Ct. 673 (Jan. 18, 1978). There the Court found that even those persons who are able to secure court approval to marry, but do not, and those who do, suffer a burden on their right or a limitation on its exercise by having to show financial ability to support their minor children.

438 (1972) (contraceptives only available to married persons); *Reed v. Reed*, 404 U.S. 71 (1971) (discrimination against females in appointment by Probate Court as administrators of estates). This Court has invoked such close scrutiny under both the due process and equal protection guarantees of the Fifth and Fourteenth Amendments and there is no essential difference whether the examination is done under the rubric of Due Process or Equal Protection. *See, e.g., Moore v. City of East Cleveland, supra* (substantive due process under the Fourteenth Amendment); *Califano v. Goldfarb, supra* (equal protection under the Fifth Amendment; *Eisenstadt v. Baird, supra* (equal protection under the Fourteenth Amendment); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (substantive due process under the Fifth Amendment). It is conceded by the Secretary that the Equal Protection Clause of the Fourteenth Amendment finds similar life in the Fifth Amendment due process guarantee. (*See* J.S. App. 20A.)

Likewise, the standard of review in the international travel cases has consistently led to a heightened examination of the challenged restriction. This case marks the fourth attempt by the government to convince this Court that infringements of the right to travel abroad should be measured by no more than a "rational basis" test. Its three prior efforts failed. *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Zemel v. Rusk*, 381 U.S. 1 (1965). In *Aptheker*, the Court reversed the lower court's opinion which had applied a "reasonable" basis standard. (378 U.S. at 505.)

The Secretary incorrectly claims that none of the Court's prior decisions concerning international travel "indicated that the right . . . is fundamental or 'basic' " and that

"none enunciated a special test for determining when particular foreign travel regulations violated the Due Process Clause." (Sec. Bf., 18.) In *Kent*, the Court clearly and emphatically stated that the right is "basic in our scheme of values." (357 U.S. at 126.) Six years later in *Aptheker*, it quoted the same passage from *Kent* to reiterate the "basic" nature of the right. (378 U.S. at 506.) Again in *Zemel* it cited the same passage to emphasize the constitutional importance of the right. (381 U.S. at 14.) While the trio of international travel cases lacks language wedded to a rigid two-tier formula distinguishing between "strict scrutiny" and a "rational basis" test, there can be no doubt that in each case the Court invoked a heightened scrutiny due to the historical importance of the right to freedom of movement across our frontiers.

Before proceeding to analyze *Kent, Aptheker* and *Zemel* in some detail, the broader aspects of those decisions should be expressed so that they are borne in mind throughout that detailed analysis. Common to all cases was a clear recognition of the special importance of the right to travel abroad, and counterposed against this crucial aspect of personal freedom were the broad and fundamental interests of the federal government in directing the nation's foreign policy and securing the national defense. Yet, it was only in *Zemel*, where the governmental interest loomed so large, and where it was not demonstrated that its interest could be accommodated in a way which trenched more lightly on the freedom, that this Court allowed the balance to be struck in favor of the government. Putting the balancing test in a nutshell, the *Zemel* Court said: "[t]he requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of

the extent of the necessity for the restriction." (381 U.S. at 14.) Here, the awesome nature of the nation's foreign policy, national security and national defense is wholly absent.

In *Kent v. Dulles, supra*, the Court for the first time dealt with the nature and scope of protection afforded the right to travel abroad. The Court characterized the right as "an important aspect of the citizen's 'liberty' " guaranteed by the Due Process Clause (357 U.S. at 127), and emphasized that it "was a part of our heritage" (*Id.*, 126), "emerging at least as early as the Magna Carta." (*Id.*, 125.) The Court recognized that "[t]ravel abroad, like travel within the country . . . is basic in our scheme of values." (*Id.*, 126.) The *Kent* decision relied upon *Crandall v. State of Nevada*, 73 U.S. (6 Wall) 35 (1867), *Williams v. Fears*, 179 U.S. 270 (1900), and *Edwards v. California*, 314 U.S. 160 (1941), all involving travel within the United States. (357 U.S. at 126.) Other decisions of this Court and of lower courts have also cited interstate and international travel cases interchangeably. *See Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (Douglas J. concurring); *Bell v. Maryland*, 378 U.S. 226, 250 (1964); *United States v. Davis*, 482 F.2d 893, 912 (9th Cir. 1973); *United States v. Cyzewski*, 484 F.2d 509, 511 n.2 (5th Cir. 1973), *cert. denied*, 415 U.S. 902 (1974); *King v. New Rochelle Muni. Housing Auth.*, 442 F.2d 646, 648-49 (2d Cir. 1971); *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (1st cir. 1970), *aff'd* 405 U.S. 438 (1972); *Wilson v. United States*, 366 F.2d 666, 668 n.2 (D.C. Cir. 1966) (Bazelon, C.J. concurring); *Schactman v. Dulles*, 225 F.2d 938, 944 (D.C. Cir. 1955); *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D.C. 1952).

Kent did not treat the right as a mere abstraction but elaborated upon the multiplicity of highly personal interests which it subsumes. It involves, as the facts of this case poignantly demonstrate, " 'reasons close to the core of personal life — marriage, reuniting families, spending hours with old friends,' " (357 U.S. at 126) or "[i]t may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." (*Ibid.*) It "may be necessary for a livelihood." (*Ibid.*) Foreign travel serves the intellectual interests of our press and academic community as well as enhancing each American's understanding of public issues by direct contact with foreign peoples. (*Id.*, 126-27.) Given this constitutionally protected "liberty," the Court fashioned a rule of strict statutory construction to "construe narrowly all delegated powers that curtail or dilute" the right to foreign travel. (*Id.*, 129.) The rule was applied to invalidate the Secretary's claim of statutory authorization to deny passports to persons because of their alleged Commuist beliefs and associations.

Next, this Court decided *Aptheker v. Secretary of State, supra*, which like this case, concerned the constitutionality of a Congressional enactment restricting foreign travel to some citizens. The government again argued, as it does here, that the right could be curtailed by "reasonable regulation" judged by a simple rational relationship to the governmental purposes advanced. (378 U.S. at 505.) The Court rejected that assertion because it undervalued the right under examination:

> [T]here are well-established principles by which to test whether the restrictions here imposed are consistent with liberty guaranteed in the Fifth Amendment. It is a familiar and basic principle . . . that 'a governmental purpose to control or prevent activities

constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

* * *

'[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.'
(*Id.*, 508) (citations ommitted).

While in *Aptheker* the legitimate purpose for limiting travel was to "protect our national security" (*id.*, 509), the Court nevertheless found that less intrusive means were available for achieving the purpose. (*Id.*, 512-13.) It further ruled that the limitation was not "narrowly drawn to prevent the supposed evil" and that "precision must be the touchstone of legislation so affecting basic freedoms." (*Id.*, 514.) The Court found that the limitation on travel was supported "only by a tenuous relationship" between the means adopted and Congressional objective sought in the challenged statute. (*Ibid.*) The Secretary's effort to obfuscate the principles that emerge from the *Aptheker* decision cannot withstand the clarity of that holding, especially since the dissenting opinion in that case adopted the "reasonable" standard test urged then and now by the government. (*Id.*, 525-26.)

Zemel v. Rusk, supra, is the most recent international travel case to be decided by this Court on constitutional grounds. *Zemel* similarly mandates constitutional standards far more stringent than the "rational basis" test urged by the Secretary. Shortly before the Cuban missile crisis,

the Secretary of State restricted travel to Cuba. The Court devoted much of its analysis to an examination of the "extent of the necessity for the restriction" on travel. (381 U.S. at 14-17.) It concluded that because of the "weightiest considerations of national security" (*Id*, 16) and the risk that travel to Cuba "might involve the Nation in dangerous international incidents . . ." (*Id.*, 15), the right of the individual must succumb to the Nation's needs. This Court clearly required and found a government interest having more than just some "rational basis."

The standards developed in *Kent* and *Aptheker*, and applied in *Zemel*, have precedential value which cannot now be ignored. Together, these cases require that restrictions on international travel be supported by the "weightiest" governmental interests (*Zemel, supra*, 381 U.S. at 16), and cannot be achieved "by means which sweep unnecessarily broadly" when others are available. *Aptheker, supra*, 378 U.S. at 508.

In *United States v. Laub*, 385 U.S. 475 (1967), this Court again refused to give a broad construction to the Immigration and Nationality Act (8 U.S.C. §1185(b)) as urged by the government to impose criminal penalties for travel to Cuba without a passport. Consistent with the principle of strict construction of statutes affecting international travel laid down in *Kent*, the Court required an explicit Congressional approval for such sanctions and found none.[11]

[11]That rule of strict statutory construction of limitations on foreign travel was followed by the Court of Appeals in *Lynd v. Rusk*, 389 F.2d 940, 945 (D.C. Cir. 1967) to invalidate administrative sanctions of passport revocation and non-renewal, until it was assured than an individual would not travel in the future in violation of an area restriction. More recently, a lower court has invalidated the loyalty oath requirement for passport applicants on both statutory and constitutional grounds. *Woodward v. Rogers*, 344 F. Supp. 974 (D. D.C. 1972), *aff'd* 486 F.2d 1317 (D.C. Cir. 1973).

This unbroken series of decisions[12] has accorded the right to international travel protection under the Fifth Amendment that can only be restricted for clearly validated reasons of foreign policy and national security. More than 750 years of Anglo-American history reveal the same narrow restriction. The district court correctly relied on these cases in finding §1611(f) invalid under the Due Process Clause of the Fifth Amendment. (J.S. App. 16A n.8.)

D. Section 1611(f) Sweeps Too Broadly On The Right To Travel Abroad Without Substantially Achieving Its Purposes.

1. The residency justification of §1611(f) is insufficient to support its constitutionality.

a. Prior establishment of United States residency.

The Secretary's primary argument in support of §1611(f) is that it provides "one means of implementing the [SSI] residence requirement." (Sec. Bf., 21-24.)

[12]The Court's recent decision in *Califano v. Gautier Torres*, 98 S. Ct. 906 (Feb. 27, 1978) is not an international travel case. There an SSI recipient living in Connecticut moved to Puerto Rico to take up permanent residence. The Court ruled that such travel was interstate travel. It held the termination of his SSI for moving to Puerto Rico did not infringe the right, since he was treated no differently from all other residents who were ineligible for SSI. In this case, the right to international travel is involved because it concerns SSI recipients who do not intend to abandon their residence when they travel abroad and return.

Section 1614(a)(1)(B) (42 U.S.C. §1382c(a)(1)(B)) requires that each SSI recipient be a "resident of the United States." Limiting SSI to bona fide United States residents is a legitimate government purpose, as we conceded and the district court agreed. (J.S. App. 16A.) *See also Califano v. Gautier Torres*, 98 S. Ct. 960 (Feb. 27, 1978).

In making the residence determination, the Secretary has a wide variety of data at his disposal. His Claims Manual ("CM") §A2101(a) provides:

> For purposes of Title XVI, a person becomes a resident when he establishes a *factual place of abode* and lives in a particular locality in one of the 50 states or the District of Columbia *with the intent to remain there.* Where his arrival is of recent date and he has not established a permanent home, the intent may be inferred from such actions as arranging for a rental or purchase of a dwelling, obtaining or seeking employment, joining a church or the like. (emphasis added).

A number of questions on the application form are directed to eliciting these objective factors of the applicant's subjective "intent." These include inquiries into how long the applicant has made his home in the United States (CM §12117(e)); whether the applicant has been outside the United States in the previous 30 days (*Id.*, §12117(f)); where and with whom the applicant resides (*id.*, §12122); whether the applicant owns, is buying or rents his home (*id.*, §12122(c)); and the applicant's mailing address and where he "may be contacted during the day by telephone." Form SSA-8001, at 4. There are further guidelines for "developing the fact of U. S. residence" in other situations. *See* CM §A2101.5(a).[13]

[13]These provisions state that "[w]here there is nothing in [the] file to indicate that an individual is outside the United States, no question need be raised concerning residence." (CM § A2101.6(a)), unless one of the

(continued)

Everyone concedes that Aznavorian, Tolstick and Rivas were bona fide residents of the United States at the time they made their decisions to travel abroad. Thus, in compliance with the Secretary's rules and regulations, they had demonstrated that they had permanent homes in the United States and that they intended to remain here indefinitely.

b. Abandonment of United States residence.

The first sentence of §1611(f) states in relevant part:

...no individual shall be considered an eligible indivi-

(footnote continued from preceding page)
following situations exists: (1) the address is "a post office box or general delivery in city or town bordering on Canada or Mexico" or (2) is "in the care of another person." (*Id.*, § A2101.5(a)(1), (2).)

(1) Where the address appears to be a mail drop in a town bordering Canada or Mexico, the SSI worker is instructed to "obtain an explanation," and if satisfactorily provided, "no further development is needed." (*Id.*, § A2101.5(b).) If the SSI applicant is not readily available to provide such an explanation, the SSI worker is instructed to "consult the telephone or city directory" (*ibid*) to determine whether the applicant is listed in the city or town. If so, and in the absence of anything else in the file which raises a question concerning the applicant's residence, the SSI worker is instructed to "obtain the statements of two reliable persons who can state with knowledge where the claimant lives." (*Ibid.*) Finally, the Claims Manual provides certain "Development Guides" to assist in establishing a claimant's residence. (*Id.*, § A2101.5(d).)

(2) Where the applicant provides an address in care of another person, he is to be contacted and questioned regarding his residence. (§ A2101.5(c)) If no questions are raised in the interview, "no further development is needed." (Ibid.) If questions concerning residency remain after the interview, the SSI worker is instructed to "obtain the statements of two reliable persons who can state with knowledge where the claimant lives." (*Ibid.*) Finally, the Claims Manual provides certain "Development Guides" to assist in establishing a claimant's residence. (*Id.*, § A2101.5(d).)

dual [for SSI]...for a month during all of which such individual is outside the United States...

The district court ruled, and the Secretary does not dispute, that the effect of this provision is "to create a conclusive presumption of abandonment of United States residency upon any departure exceeding one calendar month." (J.S. App. 11A.)

i. Factual inaccuracy of the abandonment of residency presumption.

Factual support for the relationship between a recipient's month long trip and his abandonment of United States residence is wholly lacking. There is no meaningful legislative history. The Secretary's only two citations are to passages in the House and Senate reports that simply redescribe the operative terms and effect of the presumption. *See* H.R. Rep. No. 231, 92d Cong., 1st Sess. 149 (1971); S. Rep. No. 1230, 92d Cong., 2d Sess. 385 (1972). Moreover the legislative history reveals that Congress did not give any specific attention to the facts underlying the abandonment presumption. *See Califano v. Goldfarb*, 430 U.S. 199, 215 (1977). Nor was the presumption "evolved in response to problems experienced in the administration of" welfare programs replaced by SSI. *See Cleland v. National College of Business*, 98 S. Ct. 1024, 1026 (Mar. 20, 1978) (upholding a classificatory provision based on extensive Congressional experience with specific abuses and their solutions over two decades). The presumption found in §1611(f) also lacks the kind of history of Congressional study and concern that led the Court to

uphold the dependency presumptions in *Weinberger v. Salfi*, 422 U.S. 749, 777-80 (1975) and *Mathews v. De Castro*, 429 U.S. 181, 187 (1976).

What experience does the Secretary have in administering the SSI program to support the abandonment presumption in §1611(f)? Responding to a specific interrogatory on that question, he admitted that:

> ...[N]o statistics [are maintained] to substantiate ... [the] ...assertion that the one month or 30-day travel period is substantially related in fact to abandonment or establishment of residency. (J.S. App. 19A.)

Thus, the relationship between the known fact of a month trip and the presumed fact of abandonment of residency is without evidentiary foundation. *Cf. Jimenez v. Weinberger*, 417 U.S. 628, 633 (1974); *Memorial Hospital v. Maricopa Co.*, 415 U.S. 250, 267 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Craig v. Boren*, 429 U.S. 190, 200-04 (1976).

Absent any legislative history, the Secretary postulates several factual assumptions to support the abandonment presumption. "Because international travel is costly" (Sec. Bf., 24-25), and "SSI recipients are not wealthy," they are "unlikely to take lengthy tours abroad..." (*Id.*, 23.) Thus, the SSI recipient traveling abroad for more than a month is "taking up residence outside the United States." (*Id.*, 25.) These speculations are insufficient because they are not based on "tradition and common experience" (*Califano v. Jobst*, 98 S. Ct. 95, 99 (1977)) or on "reasonable empirical judgments." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

The Secretary portrays foreign travel as a luxury "tour" for the wealthy and beyond the financial means of SSI recipients. Whatever the truth of that picture in some by-

gone era (*Stanton v. Stanton*, 421 U.S. 7, 14 (1975)), it does not fit travel abroad in this age of cheap commercial transportation. Foreign travel is often as inexpensive as interstate travel: trips to Canada or to Mexico, such as Mrs. Aznavorian's, cost less than many trips within the country. Indeed, when more than 8 million citizens of this country traveled abroad and returned the same year as Mrs. Aznavorian, it is fair to observe that foreign travel has become commonplace. *See* 1975 INS *Ann. Rep.* 32.

Foreign travel is not just a "tour." (Sec. Bf., 23.) This Court recognized more than two decades ago that people travel abroad for " 'reasons close to the core of personal life —marriage, reuniting families, spending hours with old friends,' " "a livelihood," scholarship and information. *Kent v. Dulles*, 357 U.S. 116, 126-27 (1958). That recognition is equally true today. The facts here reveal the intensely personal reasons why the aged and disabled typically travel abroad. Mrs. Aznavorian went to Mexico for health reasons. Rivas and Tolstick wanted in their old age to briefly see their homelands and families one more time. Surely, in this land of immigrants, it is not surprising that its residents want to reaffirm family ties abroad.

SSI recipients are, of course, "not wealthy," but cheap, accessible transportation brings foreign travel within their means. Through savings, they can acquire up to $1,500 without losing SSI benefits, a sum enabling them to make a trip abroad for considerably more than one month. Moreover, there is no limitation on how recipients may spend their funds, as the Secretary's regulations make clear: "...[n]o restrictions, implied or otherwise, are placed on how recipients spend federal payments." 20 C.F.R. §416.110(c).

When millions of Americans travel abroad and return each year, there is no basis for assuming that recipients are abandoning their residence from the mere fact of their short, one month absence from the United States. Considering the indiscriminately wide sweep of §1611(f)'s presumption, the Secretary correctly concedes that it is "arbitrary." (Sec. Bf., 24.) But it is clearly arbitrary far more frequently than "on occasion" as he suggests. Given the financial means and the reasons why recipients typically travel abroad, the Secretary has not demonstrated the substantial rationality of the abandonment of residency presumption by any "tradition," "common experience" or "reasoned empirical judgments."

ii. Administrative convenience.

Despite the lack of substantial rationality in the abandonment presumption, the Secretary tries to justify it as administratively convenient in avoiding the costs and errors of individual abandonment determinations and in preventing fraud. (Sec. Bf., 22-23.) Every short cut saves funds, but "bright lines" do not blind the Court from assessing what is gained and lost in the administration of a whole program by the operation of such a presumption.

The assumption underlying the presumption in §1611(f) is so tenuous and unsupported by any evidence, experience or common sense, that there can be little doubt that it denies SSI benefits to far more eligible recipients than to non-residents. Section 1611(f) constitutes a broad, blanket presumption that precludes any alternative method for proving retention of United States residence. The Court has

struck down just such legislative classifications because they allowed no "... middle ground between the extremes of complete exclusion and case-by-case determination..." *Trimble v. Gordon*, 430 U.S. 762, 771 (1977). *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). By contrast it has upheld classifications which were "carefully tuned to alternative considerations" and allowed many persons to rebut the presumption. *Mathews v. Lucas*, 427 U.S. 495, 513 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 770-72 (1975). The key to these decisions is that classifications must be narrowly drawn so that they do not broadly deny persons the opportunity to establish their eligibility for benefits if there are alternatives to a broad conclusive presumption.[14] This is substantially the test used by the Court in *Kent, Aptheker* and *Zemel* when it examined the "necessity for the government's restriction" on international travel.

As the district court recognized, the Secretary has a fully panolpy of alternatives currently available to avoid the broad exclusions of eligible recipients traveling abroad occurring under § 1611(f). These methods accomplish the objective of limiting SSI to bona fide United States residents. (J.S. App. 18A-19A.) Secretary has a broad duty to monitor the continuing eligiblity of recipients. Section 1631(e)(1)(A), 42 U.S.C. §1383(e)(1)(A). His regulations require at least annual redeterminations of eligibility. 20 C.F.R. §416.222. To assist in this task, he has imposed

[14]The Secretary's reliance on *Mathews v. Diaz*, 426 U.S. 67 (1976) is inappropriate. The Court specifically observed that Congressional classifications involving aliens are typically allowed broader latitude than would be permitted for those affecting citizens based on its constitutionally recognized plenary power over naturalization and immigration. *See also Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

certain responsibilities on recipients. They have a continuing duty to report changed circumstances that may affect any eligibility factor, including residency. 20 C.F.R. §§416.220, 416.703. This duty "applies throughout subsequent periods" after eligibility is initially established. CM §12109(a). They must report any plans to travel abroad (*id.*, 416.703(j)), including the "length of time he expects to be away." CM §11313. The Secretary has developed guidelines for evaluating when a recipient abandons his United States residence. Claims Manual §A2101(b) provides:

> Residence ceases to exist when the individual leaves the United States with the intent to establish permanent residence outside the United States or abandons his U. S. abode. Lack of U. S. mailing address could constitute a change of residence which is other than temporary or transitory in nature, unless strong evidence can be produced which would substantiate U. S. residency. Consider such factors as whether a dwelling such as a house or apartment in the United States has been retained, and if not, under what conditions it was abandoned; how long the individual has been absent from the United States, how long the absence is likely to continue . . .

The Secretary relies on the existence of a recipient's home (CM §A1201(a)) or dwelling (*id.*, §A2101(b)) as the primary residency factor. Together, the Secretary can evaluate the travel plans of recipients in light of objective factors, including their financial resources available during their trip, to determine whether they are abandoning their residence. *Cf. Memorial Hospital, supra*, 415 U.S. at 267-68; *Shapiro, supra*, 394 U.S. at 636. While the purpose of §1611(f) may be legitimate, that purpose cannot be pursued by means that broadly stifle the right to travel

"when the end can be more narrowly achieved." *Aptheker, supra*, 378 U.S. at 508. Given the more focused means of identifying travelers who abandon their residence, the broad classification creates far many more mistaken denials of benefits than would individual determinations based on the foregoing factors.

iii. Fraud prevention.

The Secretary argues that §1611(f) "lessens the possibility of fraud" (Sec. Bf. 13, 26) in residency claims by requiring "actual physical presence" within a reasonable proximity of a SSA office, thus enabling administrators to ensure that SSI benefits reach their intended recipients. (Sec. Bf. 26.) In fact, §1611(f) does not accomplish this objective. As noted above, the SSI applicant's assertions are largely relied upon when the Secretary resolves the initial residency question and subsequent redeterminations. The Claims Manual instructs the SSA worker to "take no further action"' when an SSI applicant asserts that he has not been outside of the United States for the past 30 days. CM §12117(f). Likewise, no mechanism exists for the SSA worker to methodically ascertain whether a recipient has left the United States for more than one calendar month or 30 consecutive days. The manual section concerning suspension of benefits to recipients who are traveling, simply notes that "[w]hen a recipient reports a future absence from the United States, ascertain the length of time he expects to be away..." CM §11313. The Secretary suggests that some portion of SSI recipients will not be honest about reporting their abandonment of United States

residency, thereby requiring an "administratively simple demarcation line." (Sec. Bf., 22.) But if a recipient would not be honest about his true residency in the first instance, why would he be honest about reporting the criteria required to assess whether he falls within the "demarcation line?" In *Memorial Hospital* this Court responded to a similar claim that an easily administrable conclusive presumption of non-residency requirement prevented fraud, by noting that the dishonest applicant could just as easily swear to having fulfilled the requirement as not. (415 U.S. at 268.) As noted by the district court:

> [A] recipient/applicant could just as easily be dishonest in providing information required to apply this objective test. The fraud prevention aspect of §1611(f) can further be defeated by the recipient simply entering the United States for one day during the calendar month or thirty consecutive day period that would otherwise trigger a suspension of benefits. (J.S. App. 18A.)

Given the ease with which §1611(f) can be circumvented, it may in fact increase rather than decrease fraud in the SSI program.

Other sections[15] within the Social Security Act have been established for the specific purpose of preventing fraud and circumvention of eligibility criteria. The Act provides for specific penalties in the event a recipient fails "to submit a report of events and changes in circumstances relevant to

[15] *See, e.g.*, Section 1631(e)(1)(B), 42 U.S.C. § 1383(e)(1)(B) (requiring verification of information received from an applicant/recipient); Section 1611(e)(3), 42 U.S.C. § 1382(e)(3) (requiring the monitoring of all recipients); Section 1631(b), 42 U.S.C. § 1383(b) (requiring repayment to the programs of overpayments received by recipients).

eligibility . . . or delays[s] . . . in submitting a report" as required by the Secretary. Section 1631(e)(2), 42 U.S.C. §1383(e)(2). No law suggests that a recipient's obligation to cooperate with SSA on eligibility matters, including residency matters, evaporates while he is traveling. The Act also provides for criminal penalties in circumstances involving fraudulent acts to obtain benefits. In addition to available criminal penalties, the Act provides for a "proper adjustment or recovery" to be made by "appropriate adjustments in future payments" when a fraudulent overpayment is discovered. Section 1631(b), 42 U.S.C. §1383(b).

The inconsequential relationship between §1611(f) and the prevention of fraud cannot withstand constitutional scrutiny under the Fifth Amendment's Due Process Clause. The statute is obviously not narrowly drawn and there is no evidence that its alleged fraud prevention aspects would be "significantly impaired" if §1611(f) were to be found unconstitutional. *Jimenez v. Weinberger, supra*, 417 U.S. at 633. In fact, under such circumstances the Secretary will simply continue to enforce the particular fraud prevention devices already in place in the SSI program.

c. Reacquisition of United States residence.

The second sentence of §1611(f) states in relevant part:

> ...For purpose of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining *outside* the United States until he has been *in* the United States for a period of 30 consecutive days. (emphasis added).

This provision precludes recipients who have returned from showing that they are United States residents. The Secretary only asserts that this provision "insures that SSI recipients are United States residents" (Sec. Bf. 23) and "avoids unequal treatment" by denying benefits to those whose month trips do not coincide with a calendar month, and hence are not denied under the first sentence in §1611(f). (*Id.*, 24.)

i. Factual inaccuracy of residency and penalty purposes.

Again, like the abandonment provision, the factual assumptions behind the residency purpose have no legislative history, or evidentiary record to support them. (*See, supra*, 43-44.) In light of "common experience" and "reasonable empirical judgments," these assumptions are even more illusory than those postulated for the abandonment presumption of the first sentence. The first crucial fact which undercuts any abandonment justification for this waiting period is that it applies only to individuals who have returned to the United States. Second, all these returned SSI recipients have already established once to the satisfaction of the Secretary that they are bona fide residents of the United States. Third, to the extent this provision presumes abandonment from a month trip it is as tenuous as the first sentence. (*See, supra*, 43-46.)

The Secretary argues that the second sentence of §1611(f) "avoids unequal treatment" of persons who travel abroad for more than 30 days but are not out of the country for one full calendar month. (Sec. Bf., 24.) The 30-

day rule assertedly equalizes the penalty on the calendar month traveler by also taking benefits away from the 30-day traveler for the first 30 days following his return home. However, the statute subverts its purported goal. Except during February, a person traveling abroad for any other full calendar month, will have a double penalty: he loses one month's benefits under the first sentence, and one more under the second. Indeed, it creates the very kind of "unequal treatment" the Secretary asserts it was designed to avoid.

ii. Administrative convenience.

The Secretary asserts the 30-day rule is administratively convenient in preventing fraudulent residency claims. (Sec. Bf., 24.) The "easily administrable method of restricting benefits to United States residents" that the Secretary seeks (*id.*, 23), is already in existence and is followed in determining a claimant's initial and continuing eligibility under §1614(a)(1)(B). The "method" consists of rational objective criteria utilized to determine residency when persons first apply for SSI. (*See, supra*, 41-43.) Indeed, as the Secretary stated in the district court:

> When someone is in the United States and attempting to establish residence . . . it is a relatively simple matter to check the claims of the establishment of residency should need arise. . .
>
> (R. 286.)

Moreover, since the Secretary has a duty to ensure compliance with all eligibility requirements at the end of the

30-day waiting period, the waiting period constitutes a separate and independent residence test imposed solely for foreign travel. As such, it is invalid even under a rational basis test. *Shapiro, supra*, 394 U.S. at 638. Thus, the only effect of this 30-day period is to delay the receipt of benefits. Managing to survive for a month without benefits undoubtedly tests an aged, blind or disabled recipient's endurance and resourcefulness, but it is obviously an arbitrary and irrational way to determine his intent to live here.

iii. Fraud prevention.

The Secretary's fraud prevention argument is even more illusory when applied to returned recipients during the 30-day waiting period, than to those who are traveling abroad. (Sec. Bf., 26.) As noted, the reacquisition test in the second sentence of §1611(f) accomplishes nothing more than a 30 day delay in the Secretary's determination of the recipient's residency. It does not obviate the Secretary's general duty to ensure compliance by a recipient with the United States residency requirement in §1614(a)(1)(B).

The Secretary argues that the abandonment presumption in the first sentence assists in the prevention of fraud by requiring "actual physical presence" in close proximity to a SSA office. That rationale obviously has no application when a recipient has returned to the United States, where he will always be near some office. As the Secretary has conceded, ". . . it is a relatively simple matter to check the [residence] claims" of such people. (R. 286.) Returned

recipients are in precisely the same situation as all other SSI claimants: there is no special need to impose a 30-day waiting period to prevent fraud when the Secretary does not do so for any other person in the United States. To the extent that a recipient is dishonest, the 30-day rule can be easily circumvented by the failure to report a trip of 30 consecutive days. In a word, the second sentence adds nothing and accomplishes nothing to prevent fraud.

2. The "windfall" and "lack of need" justifications for §1611(f) are insufficient to support the constitutionality of the statute.

The Secretary argues that §1611(f) has two other related objectives: preventing SSI recipients from obtaining "windfall" benefits while traveling abroad, and reinforcing SSI "need requirements[s]." (Sec. Bf., 24-25.) But the Court has often noted in due process cases that assertions of legislative purposes need not be accepted at face value, when other factors demonstrate the asserted purposes could not have been a goal of the legislation. *E.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 500 n.7 (1977); *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 536-38 (1973). This principle applies here.

Assertions of legislative purpose raised for the first time late in the litigation are unlikely to be real purposes. *Cf. Turner v. Department of Employment Security*, 423 U.S. 44, 45 n.* (1975). In contrast to the residency claim which

the Secretary has maintained throughout this case, his purported "windfall" and "need" objectives are afterthoughts. They appeared first in his Supplemental Memorandum supporting reconsideration in the district court. (R. 390-403.) Even then, their contents differed from the present formulations. Words of legislative history are not so easily changed.

In fact, the Secretary cannot cite any legislative history of §1611(f) supporting either assertion of Congressional intent. *See Califano v. Goldfarb, supra*, 430 U.S. at 214. What scant history does exist, indicates that the statute was mentioned only in its relation to a recipient's "residence abroad for a full calendar month." *See* S. Rep. 1230, 92d Cong., 2d Sess. 385 (1972); H.R. Rep. 231, 92d Cong., 1st Sess. 199 (1971). Indeed, the Secretary's "windfall" argument appears to be little more than the "selecting [of] a convenient, but false, *post-hoc* rationalization." *Craig v. Boren*, 429 U.S. 190, 200 n.7 (1976).

In determining real statutory objectives, the Court has also relied on the language of the challenged provision and determined whether another provision covered the asserted purpose. *E.g., Moore v. City of East Cleveland, supra*, 431 U.S. at 516, n.7; *Califano v. Goldfarb, supra*, 430 U.S. at 213; *U.S. Dept. of Agriculture v. Moreno, supra*, 413 U.S. at 536-37. Here, §1611(f) contains no language referring to recipients' "needs" or "windfall benefits;" it speaks only of physical presence in, and absence from, the United States. Moreover, other SSI statutes and regulations foster these specific purposes by providing complete networks aimed against fraud and designed to determine, prevent and recoup overpayments. Sections 1611(e)(3); 1631(b), (e)(1)(B); 1632 (42 U.S.C. §§1382(e)(3), 1383(b),

(e)(1)(B), 1383(a); 20 C.F.R. §§416.538, 416.558(a). (*See* J.S. App. 18A.) The overpayment provisions require the Secretary to prove that an overpayment occurred in fact before he may reduce, suspend or deny benefits. *See also Cardinale v. Mathews*, 399 F. Supp. 1163, 1175 (D.D.C. 1975) (due process also mandates factual hearing prior to SSI recoupment). Yet the Secretary's effective assumption of overpayment and consequent denial of a fair factual hearing applies only to those who exercise their basic right to international travel.

Courts uniformly invalidate statutes and reject government arguments which seek to deny public entitlements on the basis of assumed income which might not be received in fact. *See, e.g., U.S. Dept. of Agriculture v. Moreno, supra*, 413 U.S. at 535-37 (1973) (assuming "unrelated" households receive income exceeding Food Stamp eligibility); *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973) (assuming households with certain "tax dependents" receive income exceeding Food Stamp eligibility); *Hurley v. Van Lare*, 380 F. Supp. 167, 174-78 (S. & E.D. N.Y. 1974), *aff'd on other grounds*, 421 U.S. 338 (1975) (assuming "lodger" contributes to housing expense, therefore decreasing public assistance grant).

From another viewpoint it is far from clear that Congress intended to preclude what the Secretary calls "windfall benefits." when SSI recipients travel inside the United States, hospitality received while visiting family or friends is not considered "in kind" income which reduces SSI payments because they are not "living" there. Section 1612, 42 U.S.C. § 1382a; 20 C.F.R. § 416.1125(a), (b). Moreover, the Secretary expressly allows recipients to spend their entitlements when and where they choose. 20

C.F.R. §416.110(c). Thus, temporarily taking advantage of lower prices abroad is economically no different from living in a cheaper part of the United States, visiting with family and friends, or taking advantage of lower prices whenever possible.

Even if these assertions were actual purposes of §1611(f), the statute fails to bear a sufficient relationship to them. The "windfall" and "lack of need" presumptions are based on only one new factual assumption: living costs are lower in some foreign countries than in the United States. But basing the "windfall" or "lack of need" on this assumption produces grossly inaccurate results for several reasons. First, it ignores that SSI recipients may travel to countries with costs of living higher than the United States. Second, it ignores the fact that recipients — like other travelers — have fixed costs in the United States, like rent and utilities, during their trips. Third, it ignores the recipient's actual transportation costs. Fourth, it fails to consider that travelers cannot take advantage of the normal cost of living available to residents of foreign countries because temporary meals and accommodations cost more than eating and living at home. Finally, the "windfall" and "lack of need" arguments have absolutely no applicability to the 30-day reacquisition of residency period.

For these reasons, the "windfall" and "lack of need" claims cannot be the real purposes of §1611(f). If they were, they do not sufficiently accomplish their objectives to preserve the constitutionality of the statute.

None of the justifications advanced by the Secretary here is sufficient to uphold the constitutionality of §1611(f) under the principles laid down in *Kent*, *Aptheker*, *Zemel* and the other heightened scrutiny cases. Section 1611(f)

uses a sweepingly broad presumption of doubtful and insubstantial factual validity in a setting where clear alternatives exist to avoid unduly interfering with the right of aged, blind and disabled SSI recipients to travel abroad. The district court was clearly correct in ruling it unconstitutional under the Due Process Clause of the Fifth Amendment.

II.

SOVEREIGN IMMUNITY DOES NOT BAR RECOVERY OF UNCONSTITUTIONALLY DENIED SSI BENEFITS.

Because the district court held §1611(f) unconstitutional, it granted the statutorily authorized relief to Grace Aznavorian and her appellee class members. It reversed the Secretary's denial of SSI to Aznavorian during August and September, 1974, and directed him to pay her those amounts since he never contended that she in fact abandoned her United States residence during those months. (J.S. App. 32A-33A.) It also reversed the Secretary's §1611(f) denials of SSI to appellee class members. It did not direct him to pay them benefits automatically, but remanded their claims for an opportunity to show at administrative proceedings that they did not in fact abandon their United States residences during their trips abroad. (*Id.*, 32A.) That relief gives the Secretary a second chance to show his initial denials satisfied constitutional standards.

The Secretary does not assert ignorance of the content of a constitutionally permissible residency standard by which

to conduct remand proceedings. Instead he claims that sovereign immunity bars this relief. (Sec. Bf., 28-31.) In effect, he argues that the doctrine permits him to run roughshod over the constitutional rights of our poorest citizens with financial impunity by precluding their recovery of vitally necessary SSI benefits unconstitutionally denied them. He cannot be successful on this point because to do so he would have to erase decades of judicial decisions awarding illegaly denied Social Security benefits. *See, e.g., Ayers v. Hobby*, 123 F. Supp. 115, 118 (D. Va. 1954).

The Secretary does not, indeed cannot, cite any social security decision holding that sovereign immunity precludes federal courts from granting recipients and applicants an opportunity to recover benefits denied solely pursuant to an unconstitutional statute. Numerous decisions approve such relief. *E.g., Califano v. Goldfarb*, 430 U.S. 199 (1977), *aff'g Goldfarb v. Secretary of Health, Education and Welfare*, 396 F. Supp. 308, 309 (E.D. N.Y. 1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), *aff'g* 367 F. Supp. 981 (D. N.J. 1973); *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974); *Richardson v. Griffin*, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226, 1237 (D. Md. 1972); *Jimenez v. Weinberger*, 523 F.2d 689, 704 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Oliver v. Califano*, CCH Unemployment Ins. Rep. ("CCH UIR") ¶15,244 (C.D. Cal. 1977.)

Section 1631 of the Act (42 U.S.C. §1383) sets out the conditions for an individual to obtain review of the Secretary's adverse decisions concerning his eligibility for SSI. No statutory distinction is drawn between decisions which are adverse because of constitutional defects and

those based on statutory misapplication. Instead, subsection 1631(c)(1) requires the Secretary to provide a hearing to:

> any individual who . . . claims to be . . . eligible [for SSI from the time of denial] and is in disagreement with any determination . . . with respect to eligibility . . . for benefits . . .

Subsection 1631(c)(3) then provides that the Secretary's determination under subsection 1631(c)(1):

> ...shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determination under section 405 of this title [section 205 of the Act].

Section 205 sets out the district court's review jurisdiction and describes some types of judgments it may issue in a suit, like this one, to "*recover* on a claim under the Act." Section 205(h), 42 U.S.C. §405(h) (emphasis added). Pursuant to §205(g), the district court:

> ...shall have power to enter, upon the pleadings and transcript of the record a judgment, affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

Section 205, like Section 1631, draws no distinction between "constitutional" and "statutory" claims. Indeed, this Court has repeatedly interpreted §205 as authorizing actions such as this one "to recover on any claim [because] of allegedly unconstitutional statutory restrictions." *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Flemming v. Nestor*, 363 U.S. 603, 607 (1960). Consequently, other courts have interpreted §205 as a limited waiver of sovereign immunity, permitting them to "reverse" the Secretary's decisions and to direct claimants "to recover"

improperly denied payments "with or without remanding" for rehearing. *E.g., Jimenez v. Weinberger, supra*, 523 F.2d at 702, 704 n.33; *Gaither v. Gardner*, 295 F. Supp. 458, 459 (D. Md. 1969); *Cohn v. Federal Security Administration*, 199 F. Supp. 884, 885 (W.D. N.Y. 1961.)

The statutory scheme authorizing the relief granted in this case becomes complete only after consideration of §1631(b):

> Whenever the Secretary finds that . . . less than the correct amount of benefits has been paid with respect to an individual, proper . . . recovery shall . . . be made by appropriate adjustments in future payments to such individual . . . (emphasis added).[16]

The district court correctly noted that §1631(b) authorizes recovery of underpayments for "any mistaken denial," constitutional or otherwise. (J.S. App. 27A.) *See also Jimenez v. Weinberger, supra*, 523 F.2d at 703-04 (similarly construing parallel language in §204 (42 U.S.C. §404)).

Consistent with this interpretation of §1631(b), even the three cases holding §205 does not waive sovereign immunity, find no sovereign immunity bar to awarding relief almost identical to that granted here. As stated in *De Lao v. Califano*, 560 F.2d 1384, 1391 (9th Cir. 1977):

> . . . Congress has authorized retroactive payments to those who are found eligible after a hearing. It is only those found not eligible who will not get retroactive payments. Retroactive relief for them is barred by sovereign immunity.

See also Tatum v. Mathews, 541 F.2d 161, 166 n.5 (6th Cir. 1976); *Johnson v. Mathews*, 539 F.2d 1111, 1125

[16]The Secretary's regulations also contemplate the opportunity to recover underpayments. 20 CFR §§ 416.535-.543. These regulations are discussed *infra*, 64-65.

(8th Cir. 1976.)[17] And as in *Delao, Tatum* and *Johnson*, the district court limited retroactive payments to those appellee class members who proved at remand hearings they did not in fact abandon their United States residences. (J.S. App. 29A-30A.)

In addition to the absence of case support for his position (Sec. Bf., 28-31), the Secretary has repeatedly interpreted this statutory review scheme as a waiver of sovereign immunity. *See, e.g.*, Brief for Appellants in *Weinberger v. Salfi, supra*, at 17. He has done so throughout this case, both in the district court (R. 215) and here. In his brief in *Norton v. Mathews*, 427 U.S. 524 (1976) at 21, incorporated in his brief here at 10 n.6, he states:

> Under such a scheme, *every claimant* properly before the court who establishes a meritorious claim may obtain fully adequate relief without issuance of any injunciton restraining operation of the statute. If the claimants' contentions, *constitutional or otherwise*, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards). (emphasis added).

While a United States agent cannot waive sovereign immunity, the Secretary's consistent interpretation of these statutes is entitled to great weight since he is the department

[17]This is obviously not a suit for money damages, as the Secretary contends. Nor is it a suit to recover retroactive benefits for potentially ineligible persons as in *Delao, Tatum* and *Johnson*. In those cases, persons who had not yet been determined eligible for benefits sought retroactive payments for the period between their terminations and reaffirmations of ineligibility by the Secretary after a hearing. Those ineligible plaintiffs contended due process entitled them to benefits pending a hearing which redetermined ineligibility. But the due process clause is not a waiver of sovereign immunity.

head charged with their administration. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *United States v. City of Chicago*, 400 U.S. 8, 10 (1970); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

The relief granted in this case does not require a specivic statute "stating that, if a portion of [another] statute prohibiting payment is declared invalid, then payment is deemed authorized." (Sec. Bf., 29.) Even if this were a suit for damages, which it is not (*see, supra*, 64 n.18), *United States v. Testan*, 424 U.S. 392, 400 (1976) only requires a federal statute that "can *fairly be interpreted* as mandating compensation by the Federal Government for the damage sustained." (emphasis added). The Secretary and the social security decisions cited above have so interpreted § § 205 and 1631. Thus, sovereign immunity does not bar the relief awarded by district court.[18]

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[18] *Edelman v. Jordan*, 415 U.S. 651 (1974) is not relevant. (Sec. Bf., 30-31.) There, this Court held, *inter alia*, that a state's participation in the federal-state Aid to the Aged, Blind and Disabled program ("AABD"), which on January 1, 1974 became the federal SSI program involved here (415 U.S. at 653 n.2), did not constitute a waiver of its Eleventh Amendment immunity from a federal court suit for retroactive welfare benefits. (*Id.*, 671-72.) The basis for its ruling was that under the federal statutes authorizing the AABD program, a ". . . congressional authorization to sue a class of defendants which literally includes States is wholly absent." (*Id.*, 672.) Congress has specifically authorized suits in federal court against the Secretary to review and recover erroneously denied SSI benefits. Sections 205(g), 1631(b), (c), 42 U.S.C. §§ 405(g), 1383(b), (c). The *Edelman* decision was limited to the narrow waiver of Eleventh Amendment immunity, and not the broader waiver of sovereign immunity. *Martinez v. Marshall*, 573 F.2d 555, 560 (9th Cir. 1978); *Rhodes v. Weinberger*, 388 F.Supp. 437, 442 (E.D. Pa. 1975.)

III.

THE DISTRICT COURT IMPROPERLY DENIED RELIEF TO APPELLANT CLASS MEMBERS.

A. All Class Members Proceeding As A Certified Class Under § § 205(g) And 1631(c)(3) Of The Act Are Statutorily Entitled To Judicial Relief And The Opportunity To Recover Unconstitutionally Denied Benefits.

The district court refused all relief to the appellant class members. By the class definition (J.S. App. 34A-35A), all these class members had effectively submitted timely claims for relief in the district court under § § 205(g) and 1631(c)(3), and were denied their SSI entitlement by virtue of § 1611(f). Appellant class members belong to one of two subclasses: (1) eligible individuals not having current applications for SSI on the date of the district court's final order (August 23, 1977); and (2) individuals no longer eligible for SSI on that date. (J.S. App. 31A.) By denying relief to these class members, the court effectively imposed on them additional requirements for securing judicial relief and recovery of underpayments pursuant to § § 205(g) and 1631(b), (c)(3), that are nowhere found in these statutes and indeed conflict with them. That decision, unless reversed, will severely restrict judicial relief under the SSI program.

As explained *supra*, 61-63, § § 205(g) and 1631(b) and (c) set out each SSI recipient's rights to obtain administrative and judicial review of the Secretary's unconstitutional

benefit denials under §1611(f) and to recover improper underpayments. By necessity, each recipient's claim is that he was constitutionally entitled to the payment *at the time* the Secretary refused to pay it. The district court correctly noted that §1631(b) implements the Congressional intent that SSI beneficiaries "receive the full and correct amount of their entitlements, even if this requires payments to be made long after the period of entitlement." (J.S. App. 27A, quoting *Jimenez v. Weinberger, supra*, 523 F.2d at 704.)

Nothing in the Act or the Secretary's regulations permits a court to refuse relief to an individual SSI claimant after concluding the Secretary denied him benefits pursuant to an unconstitutional statute. The Secretary's regulation states that:

> A person's right to supplemental security income payments—how much he gets and under what conditions—are clearly defined in the law. 20 C.F.R. §416.110(b).

Specifically, nothing in the Act or regulations permits a court to deny relief to a claimant properly proceeding under §§205 and 1631(c)(3) because he does not have a current application for benefits (appellant subclass 1) or because he is no longer eligible for SSI (appellant subclass 2) when the court renders its decision. Pursuant to 20 C.F.R. §416.536, underpayments occur only during periods for which a claimant "filed [an] application" and "met" SSI eligibility conditions. There is no requirement that he be filing an SSI application or be eligible therefor when a reviewing court renders its decision. Moreover, the underpayment period runs, and the "fact of underpayment" becomes established, during all months "for which there is a difference between the amount paid and the amount due."

20 C.F.R. §416.538. There is no requirement that any SSI be due to the claimant for the month when the court renders its decision. Indeed, 20 C.F.R. §416.542(a) provides for disbursing underpayments in a "separate payment" in such situations.

Together, §§205(g) and 1631(b), (c), and 20 C.F.R. §§416.536, 416.538 impose obligations (1) on the district court, at least to grant a remand for an administrative rehearing to an individual otherwise eligible for SSI when benefits were illegally denied, and (2) on the Secretary to pay those wrongfully denied benefits to such an individual. The district court could not condition such obligations on an individual's eligibility for SSI or pending SSI application on the date of judicial decision, since to do so would create an additional eligibility requirement unauthorized by the Act.[19]

Individual claimants who happen to be class members satisfying all requirements of §§205(g) and 1631(c)(3) have the same rights to judicial review and recovery of underpayments as all other individuals. The district court properly ruled that class actions are permitted under sections 205(g) and 1631(c)(3).[20] The Secretary does not

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[19] *Cf. Carleson v. Remillard*, 406 U.S. 598, 600 (1972); *Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309, 333 (1968). These cases rely on Congressional legislative history in holding that states cannot impose additional eligibility requirements unauthorized by federal statute.

[20] *See, e.g., Liberty Alliance v. Califano*, 568 F.2d 333, 346-47 (3rd Cir. 1977); *Wilson v. Edelman*, 542 F.2d 1260, 1275 (7th Cir. 1976); *Tatum v. Mathews, supra*, 541 F.2d at 163-64; *Johnson v. Mathews, supra*, 539 F.2d at 1125-26; *Jimenez v. Weinberger, supra*, 523 F.2d at 694-96; *Oliver v. Califano*, CCH UIR ¶15,244 (C.D. Cal. 1977); *see also Norton v. Mathews, supra*, 427 U.S. at 533-38 (1976) (Stevens, Brennan, Marshall, J.J. dissenting) (Court did not reach the class certification issue, but dissent noted class actions proper).

contest that ruling here. (Sec. Bf., 9 n.6.) Consistent with the Court's opinions in *Mathews v. Eldridge*, 424 U.S. 319, 328-33 (1976) and *Mathews v. Diaz*, 426 U.S. 67, 74-76 (1976) and lower court decisions cited, *supra*, 68 n.20, the district court defined the class so that every member individually satisfied the judicial review requirements of §§205(g) and 1631(c)(3). The Secretary expressly concedes this point. (Sec. Bf., 8 n.6.)

Class certification under §§205(g) and 1631(c)(3) "conferred jurisdiction on the district court to hear [the timely claims] by each individual member of the class." *Johnson v. Mathews, supra*, 539 F.2d at 1126; *Jimenez v. Weinberger, supra*, 523 F.2d at 694, 695-96. Given such jurisdiction, courts uniformly grant back payment relief to *all* class members denied benefits solely by virtue of unconstitutional statutes (*Jimenez v. Weinberger, supra*, 523 F.2d at 704; *Griffin v. Richardson, supra*, 346 F. Supp. at 1230; *Morris v. Richardson*, 346 F. Supp. 494, 500 (N.D. Ga. 1972) (three-judge court), *vac. and remanded on other grounds*, 409 U.S. 464 (1973); *Oliver v. Califano, supra*) or the opportunity to obtain such relief at an administrative hearing. *Tatum v. Mathews, supra*, 541 F.2d at 166 n.5; *Johnson v. Mathews, supra*, 539 F.2d at 1125.

The foregoing statutes, regulations and cases establish appellant class members' entitlement to relief under the Social Security Act, as a matter of right. The district court cited no statute, regulation or social security case to support its denial of relief. It relied solely on *Rothstein v. Wyman*, 467 F.2d 226, 235 (2nd Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), which held that under the Aid to Families With Dependent Children program, 42 U.S.C. §601 *et seq.*, a

court is not required to order a state to make retroactive payments to class members illegally denied AFDC benefits. But the AFDC statutory scheme is so fundamentally different from the SSI program that *Rothstein* is simply inapplicable in resolving the class relief question here. First, no statute required states to restore AFDC payments wrongfully denied. *See Jimenez v. Weinberger, supra*, 523 F.2d at 704 n.33. In contrast, §1631(b) and implementing regulations require such payments to SSI beneficiaries. Second, Congress did not specifically authorize suits in federal court to review illegal AFDC denials; the claim to recover the payments in *Rothstein* was based upon the Court's pendent jurisdiction. Under the SSI program, Congress specifically authorized suits in federal court to review SSI denials, pursuant to §§205(g) and 1631(c)(3). Third, because Congress has placed a sixty-day limitation period on seeking judicial review in SSI cases, there is neither need nor room for district courts to guess, as in *Rothstein*, whether recovery of underpayments "would become compensatory rather than remedial." (J.S. App. 31A.) Given these basic distinctions between the two statutory schemes, the district court had no discretion to consider any so-called equitable factors in determining whether to grant appellants the relief requested.

B. The District Court Abused Any Discretion It Had In Denying Relief To Appellant Class Members.

Assuming, arguendo, that the district court had some discretion to weigh equities in determining whether to grant

appellants relief, refusing all relief was an abuse of discretion.

(1) *Subclass eligible for SSI on the order date but not applying for it at that time.* The district court recognized the possibility that "these persons are indeed needy." (J.S. App. 31A-32A.) Thus, granting relief to this subclass would serve the court's articulated purpose of the SSI program: "to help those who are currently needy." (*Id.*, 31A.) In fact, denying relief to this group penalized them twice: first for exercising their right to travel and second, for attempting to survive without governmental assistance despite their age, disability, or blindness.[21] One can only speculate why these appellants did not re-apply for SSI, but as this Court noted in *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970):

> . . . [Public assistance] provides the means to obtain essential food, clothing, housing, and medical care . . . [T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. *His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.* (emphasis added and in original and footnote omitted).

Despite these factors, the court denied relief to this subclass, asserting:

> It would impose a completely unrealistic and undue

[21]This Court has noted that public assistance "is given to persons on the very margin of subsistence . . ." *Mathews v. Eldridge, supra,* 424 U.S. at 340.

> burden on the defendant to expect him to determine who these persons might be. (J.S. App. 32A.)

This reasoning is factually incorrect. The Secrtary admitted that he can identify *all* persons who were unconstitutionally denied benefits pursuant to §1611(f) (R. 707.) He made no distinction between identifying this subclass and all other class members. Indeed, he could make no such distinction, since the computer code, identifying recipients denied SSI pursuant to the unconstitutional statute, lumps all such people into one category. (*Id.*, 708.)

The district court's reasoning also conflicts with other parts of its decision. It rejected the Secretary's "administrative burden" argument for avoiding back payments to other class members because: (a) he conceded that the requested class relief would not require reducing the scope of SSI beneficiaries; (b) his administrative burden argument is only a factually unsupported "assertion;" and (c) administrative costs alone are insufficient cause for denying unconstitutionally suspended public entitlements. (J.S. App. 27A-28A.) *See also Jimenez v. Weinberger, supra,* 523 F.2d at 704. These reasons apply equally to this subclass of admittedly poor persons eligible for SSI.

(2) *Subclass no longer eligible for SSI on the order date.* The district court denied relief to this subclass because:

> [R]etroactive payments should go to only those who were unconstitutionally denied benefits in the past, but who are still *currently needy*, and thus still eligible for SSI benefits. If a person is not presently needy, then there would be no purpose served by granting him retroactive benefits. In such a situation, it would appear that the payments would 'become compensatory rather than remedial' (quoting *Rothstein v.*

Wyman, supra) (J.S. App. 31A) (emphasis in original).

This reasoning, like that applied to the first subclass, conflicts with the court's earlier recognition that the Secretary's unconstitutional denials:

> necessarily required the plaintiff class members to consume other assets in order to attempt to maintain their standard of living, while at the same time exercis[ing] their right to travel. (J.S. App. 26A.)

Thus, granting the opportunity to other class members to recover unconstitutionally denied SSI served the purpose of compensating them for their injuries. *See Jimenez v. Weinberger, supra*, 523 F.2d at 703; *Goldberg v. Kelly, supra*, 397 U.S. at 264. Merely because the members of this subclass would not qualify for SSI on August 23, 1977 does not negate their earlier injury shared with all other class members. Just because these appellants have by no one means or another managed to ward off starvation pending receipt of the SSI to which they were previously entitled provides no reason for refusing relief. To hold otherwise would provide a money saving device for governments at the expense of those of our citizenry least able to bear that burden.

Nor can the district court simplistically rely on *Rothstein v. Wyman, supra*, to determine that granting relief to this subclass would be "compensatory rather than remedial." As noted at *supra*, 70, district courts have no room in SSI litigation, as they did in AFDC cases, to guess when recovery of underpayments becomes compensatory: §§205(g) and 1631(c)(3) provide a bright-line period for SSI claimants to seek such recovery through judicial review. All members of this subclass met this period by class definition, as the Secretary concedes.

For these reasons, the district court abused any discretion it might have had to determine the availability of relief to the appellant class members.

CONCLUSION

The district court's judgment should be affirmed in No. 77-991 and reversed in No. 77-5999. Should this Court decide that the first sentence of §1611(f) is constitutional and the second sentence of §1611(f) unconstitutional, the district court's judgment should be affirmed in part in No. 77-991 and appropriately reversed in No. 77-5999.

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Nos. 77-991 and 77-5999

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

GRACE AZNAVORIAN, ETC.

GRACE AZNAVORIAN, ETC., APPELLANTS

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

WADE H. McCREE, JR.
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1. Appellees in No. 77-991 contend that Section 1611(f) establishes a "conclusive presumption" that an SSI beneficiary has abandoned his United States residence whenever he leaves the country for 30 consecutive days (Br. 6, 8, 13-14, 30, 41-44). This is an inaccurate characterization of the way in which Section 1611(f) operates.

One of the eligibility criteria for SSI assistance is long-term United States residence. See 42 U.S.C. (Supp. V) 1382c(a)(1)(B). Another is physical presence in the United States. The requirement of presence, implemented by Section 1611(f) and at issue here, is related to residence but does not supplant or displace proof on that subject. Rather, as we show in the main brief, the presence requirement reinforces the residence requirement and serves other purposes as well.

The independence of the two requirements is demonstrated by the fact that, once a prospective recipient of SSI benefits has established his United States residence to the Secretary's satisfaction, he is not required to reprove this aspect of eligibility each time he returns from traveling abroad for 30 or more consecutive days. Grace Aznavorian's SSI benefits were resumed in October 1974 without any new showing on her part that she intended to remain a United States resident. The fact that Aznavorian left the United States thus did not set up a presumption of any sort that she was no longer a resident of the United States.

Section 1611(f) means only that persons who are absent from the United States for extended periods do not receive benefits during that absence. As we have argued in our main brief (Br. 21-27), Section 1611(f) makes it *unnecessary* for the Secretary to determine whether residence has been abandoned during lengthy foreign trips and simultaneously helps advance the congressional purpose of providing financial assistance to those who actually need it to live in the United States. The "irrebuttable presumption" cases on which appellees rely therefore do not assist them.

2. Appellees' brief contains two errors concerning the practical effects of Section 1611(f) in particular situations. First, appellees state (Br. 8) that "[i]f a recipient makes a trip of 29 days, from January 31 to March 2, two full months of benefits are lost." This is not true. In such a situation, the recipient would not be outside the United States for 30 consecutive days and, accordingly, the 30-day rule contained in the second sentence of Section 1611(f) would not be activated. An otherwise eligible recipient traveling abroad during the period described by appellees would not receive SSI benefits for February but would receive them for March. (Of course, in a leap year, a trip that extends from January 31 to March 2 would entail 30 consecutive days outside the United States, and SSI benefits would therefore be suspended for both February and March.)

Appellees also state (Br. 51) that "[e]xcept during February, a person traveling abroad for any other full calendar month, will have a double penalty: he loses one month's benefits under the first sentence [of Section 1611(f)], and one more under the second." This assertion is accurate only when the SSI recipient returns to the United States in a month containing 30 rather than 31 days. Thus, if a person leaves the country on April 30 and returns on June 1, he can not receive SSI benefits for either May or June. But, if he leaves the country on June 30 and returns on August 1, he will lose benefits only for July.

3. Appellees repeatedly refer (Br. 6-7, 28-29, 40, 43) to the aborted foreign travel plans of Anna Tolstick and Betsabe Rivas, as if the statements contained in affidavits of these prospective intervenors were established as facts in the record. The district court denied Tolstick and Rivas leave to intervene (77-991 J.S. App. 10A-11A), because they were not injured by the application of Section 1611(f)

and therefore did not present a claim to the Secretary following a loss of benefits. The court made no findings with respect to Tolstick and Rivas, and the parties entered into no stipulation concerning the matters addressed in the affidavits of the two women. Accordingly, appellees' references to Tolstick and Rivas are mere allegations and should not be regarded as established facts.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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